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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 116.

GEORGE F. ALBRIGHT, PLAINTIFF IN ERROR,

vs.

JESUS MARIA SANDOVAL.

No. 117.

JESUS MARIA SANDOVAL, PLAINTIFF IN ERROR,

vs.

GEORGE F. ALBRIGHT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

FILED APRIL 8, 1908.

(21,097 and 21,098.)



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MEXICO.

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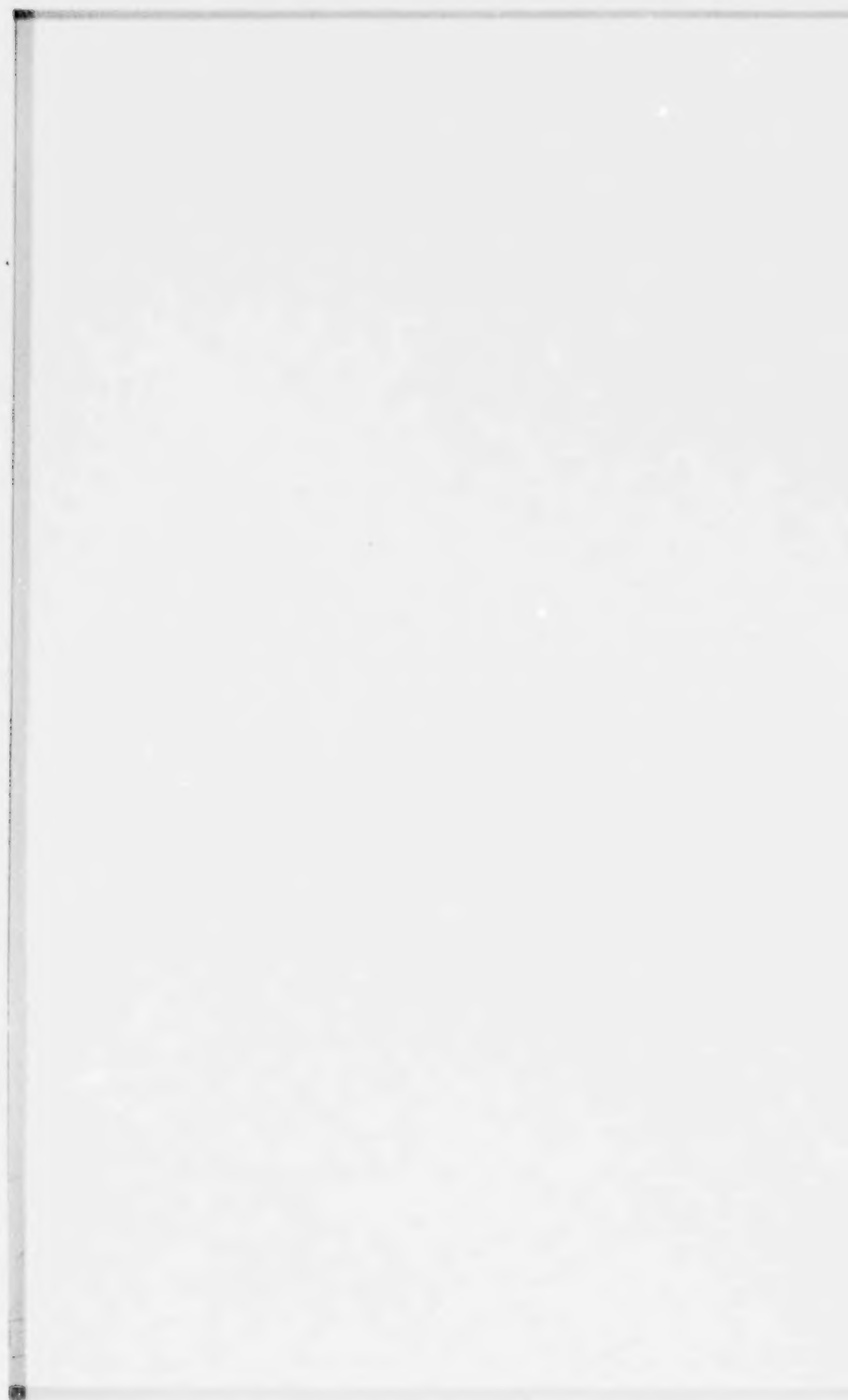
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a UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you wherein George F. Albright was appellant, and Jesus Maria Sandoval, was appellee, a manifest error hath happened, to the great damage of said appellant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 20th day of February, in the year of our Lord one thousand nine hundred and eight.

[Seal Supreme Court Territory of New Mexico.]

JOSE D. SENA,

Clerk Supreme Court of the Territory of New Mexico.

b I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby, make return to the within writ of error, by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the Supreme Court of the Territory of New Mexico.

[Seal Supreme Court Territory of New Mexico.]

JOSE D. SENA,

Clerk Supreme Court of New Mexico.

Be it remembered, that heretofore, on to wit the fourteenth day of January, A. D., 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a transcript of record, in a cause entitled, Jesus Maria Sandoval, appellee, vs. George F. Albright, appellant, and numbered therein No. 1190, which said transcript of record, was and is in words and figures following to wit:

c UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, wherein George F. Albright, was appellant and cross appellee and Jesus Maria Sandoval, was appellee and cross-appellant manifest error hath happened, to the great damage of the said cross-appellant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the seventh day of March in the year of our Lord one thousand nine hundred and eight.

[Seal Supreme Court Territory of New Mexico.]

JOSÉ D. SENA,

Clerk Supreme Court of the Territory of New Mexico.

d TERRITORY OF NEW MEXICO,

Supreme Court:

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the Supreme Court of the Territory of New Mexico, which said transcript is one and the same transcript transmitted in the writ of error of George F. Albright appellant.

[Seal Supreme Court Territory of New Mexico.]

JOSÉ D. SENA,

Clerk Supreme Court of N. M.

e THE UNITED STATES OF AMERICA:

To Jesus Maria Sandoval, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, within sixty days, from the date hereof, pursuant to a writ of error, filed in the Office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein George F. Albright, was appellant,

and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as — the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this the 20th day of February, A. D., 1908.

[Seal Supreme Court Territory of New Mexico.]

WILLIAM J. MILLS,
*Chief Justice of the Supreme Court
of the Territory of New Mexico.*

I acknowledge service of a copy of the above citation this 25th day of February, A. D., 1908, and also a copy of the order of supersedeas.

J. M. SANDOVAL,
By NEILL B. FIELD,
His Attorney.

f THE UNITED STATES OF AMERICA:

To George F. Albright, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., within sixty days, from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein Jesus Maria Sandoval, was appellee and cross-appellant and you were appellant, and cross appellee to show cause, if any there be, why the judgment rendered against the said appellee and cross appellant as — the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of the Supreme Court of the Territory of New Mexico, this the 7th day of March A. D., 1908.

[Seal Supreme Court Territory of New Mexico.]

WILLIAM J. MILLS,
*Chief Justice of the Supreme Court
of the Territory of New Mexico.*

I accept service of above citation this 9th day of March, 1908, at Albuquerque, N. M.

GEORGE F. ALBRIGHT,
By THOS. K. D. MADDISON,
His Attorney.

1 & 2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. —.

JESUS M. SANDOVAL, Appellee,

VS.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Transcript of Record.

Neill B. Field, Attorney for Appellee.

William B. Childers, Attorney for Appellant.

Be it remembered that heretofore, on, to-wit, the 26th day of December, 1904, there was filed in the office of the Clerk of the District Court of the Second Judicial District, Territory of New Mexico, within and for the County of Bernalillo, a complaint in a certain cause wherein Jesus M. Sandoval was the plaintiff and George F. Albright was the defendant, which said complaint is in the words and figures following, to-wit:

Territory of New Mexico, Bernalillo District Court.

No. 6710.

JESUS M. SANDOVAL, Plaintiff,

VS.

GEORGE F. ALBRIGHT, Defendant.

Complaint.

The plaintiff, Jesus M. Sandoval, a resident of the County of Bernalillo, in the Territory of New Mexico, complains of the defendant, George F. Albright, who is likewise a resident of the County of Bernalillo aforesaid, and alleges:

I.

That at the general election held in the Territory of New Mexico, on the 4th day of November, 1902, the plaintiff was duly elected to the office of assessor of Bernalillo County for the term of two years from the first day of January, 1903, and until his successor is duly elected and qualified, and thereafter, the plaintiff duly qualified as such assessor by taking the oath and executing the bond prescribed by law, and entered upon the discharge of the duties of said office, and plaintiff alleges that he ever since has been, and still is, the only person lawfully authorized to discharge the duties and to enjoy the emoluments and privileges appertaining to said office.

II.

Plaintiff further alleges that on the 27th day of March, 1903, the defendant, George F. Albright, without authority of law, and in violation of the rights of this plaintiff, intruded himself into the said office of assessor of Bernalillo County, New Mexico, and usurped the same, and excluded the plaintiff therefrom, and received and appropriated to his own use the fees and emoluments of the said office until, to-wit, the 19th day of November, 1904, when this plaintiff, by the consideration and judgment of this honorable court, in a certain proceeding entitled, The Territory of New Mexico, on the relation of Jesus M. Sandoval against the said George F. Albright, was restored to the possession of the said office, a copy of which said judgment is filed herewith, marked Exhibit A, and is prayed to be taken and considered as part of this complaint.

III.

Plaintiff further alleges that, between the 27th day of March, 1903, and the 19th day of November, 1904, the defendant, George F. Albright, received from various sources the sum of Six Thousand, One Hundred and Eighty-four and 15/100 (\$6,184.15) dollars of the lawful fees and emoluments pertaining to the said office of assessor of the County of Bernalillo aforesaid, and converted the same to his own use, and has ever since refused and still refuses to pay over the same, or any part thereof, to this plaintiff, who is lawfully entitled to demand and receive the same.

Wherefore plaintiff brings this suit, and prays judgment against the said defendant, George F. Albright, for the sum of seven thousand five hundred (\$7,500) dollars, his damages, together with interest and costs of suit, and for all other proper relief.

NEILL R. FIELD,
Attorney for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss.:

Jesus M. Sandoval, being first duly sworn, upon his oath deposes and says that he is the plaintiff in the above-entitled cause, that he has read the foregoing complaint and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to those parts which are made upon information and belief, and that as to those parts, he believes them to be true.

J. M. SANDOVAL.

Subscribed and sworn to before me by Jesus M. Sandoval this 26 day of December, 1904.

[NOTARIAL SEAL.]

FRANK H. MOORE,
Notary Public, Bernalillo County, New Mexico.

EXHIBIT A.

(Copy of Judgment Entered November 19th, 1904.)

Territory of New Mexico, County of Bernalillo, in the District Court.

TERRITORY OF NEW MEXICO ex Rel. JESUS MARIA SANDOVAL,
Relator,

vs.

GEORGE F. ALBRIGHT, Respondent.

This day this cause coming on to be heard upon the motion of the relator for judgment upon the pleadings, and the Court having read the same, and being fully advised in the premises, said motion

6 is by the Court sustained, as to the third and fourth paragraphs thereof.

Wherefore it is considered, ordered, adjudged and decreed by the Court that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of Assessor of the County of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of Assessor of the County of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of Assessor of the County of Bernalillo and Territory of New Mexico as the lawful custodian thereof.

It is further considered, ordered, adjudged and decreed by the Court that the relator, Jesus Maria Sandoval, do have and recover of and from the respondent, George F. Albright, his costs in this behalf expended, to be taxed, and may have execution therefor.

To the rendition of the foregoing judgment the respondent hereby excepts and prays the court to grant him an appeal and to fix the amount of a bond for supersedeas and to grant him a supersedeas upon filing proper bond in accordance with the amount so fixed, to be approved by the Court; which prayer for an appeal and for the

7 fixing and acceptance of a supersedeas bond the Court denies; and to which action of the Court denying the same the respondent, by his counsel, excepts.

B. S. BAKER, *Judge*.

Endorsed: "Filed in my office this Dec. 26, 1904.

"W. E. DAME, *Clerk*."

And thereafter, on, to-wit, the 14th day of January, 1905, there was filed in the office of the Clerk of said Court, in said cause, defendant's demurrer to the complaint, which said demurrer is in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court

JESUS M. SANDOVAL, Plaintiff,
VS.
GEORGE F. ALBRIGHT, Defendant.

Demurrer.

Now comes the defendant, George F. Albright, by W. B. Childers, his attorney, and demurs to the said complaint, and says the plaintiff ought not to have and maintain his aforesaid action against the defendant, for the following reasons, to-wit:

I.

Because said complaint alleges that the plaintiff was duly elected to said office, duly qualified by taking the oath of office and giving bond, and entered upon the discharge of the duties of said office, and if these allegations are true, the County and Territory are responsible to said plaintiff for the emoluments of said office.

II.

Because said complaint does not state facts showing that the defendant has received, on account of said office, any money to and for the use and benefit of the plaintiff.

III.

Because said complaint fails to state how, and under what conditions the said defendant usurped said office.

IV.

Because the complaint fails to state that the judgment made a part of the same is final and remains in full force, not appealed from, superseded or reversed.

V.

Because the said complaint does not state facts showing any privity between plaintiff and defendant as to the moneys alleged to have been received by him, for the receipt of which recovery is asked, entitling plaintiff to recover therefor.

VI.

Because the mere wrongful payment of such moneys to the defendant as a claimant and intruder into said office does not furnish the plaintiff a ground of recovery against the defendant.

VII.

Because the complaint fails to state the several sources from which said moneys were received, and the several amounts received from each source.

VIII.

Because the complaint does not state facts sufficient to constitute a cause of action against this defendant.

W. B. CHILDERS,
Attorney for Defendant.

Endorsed: "Filed in my office this Jan. 14, 1905.

"W. E. DAME,
Clerk."

And thereafter, on, to-wit, the 8th day of April, 1905, there was entered of record in the office of the Clerk of said Court, in said cause, an order overruling defendant's demurrer to the complaint, which said order is in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

March Term, Saturday, April 8th, 1905, Eighteenth Day.

No. 6710.

JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the Demurrer to the Complaint, the Court, on consideration thereof, overrules the same; to which the defendant duly excepted.

It is further ordered by the court that the defendant be allowed twenty days in which to answer.

IRA A. ABBOTT,
Judge.

10 And thereafter, on, to-wit, the 10th day of October, 1906, there was filed in the office of the Clerk of said Court, in said cause, defendant's Amended Answer to the complaint; which said Amended Answer is in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6710.

JESUS M. SANDOVAL, Plaintiff,
vs.
GEORGE F. ALBRIGHT, Defendant.

Amended Answer.

George F. Albright, the defendant in the above entitled cause, answers the said complaint as follows:

I.

The said defendant denies that the said plaintiff is a resident of the said County of Bernalillo.

II.

The defendant admits that the said plaintiff was elected at the general election held in the Territory of New Mexico, to the office of assessor of the County of Bernalillo, for the term of two years from the first day of January, A. D. 1903, and duly qualified as such assessor, as alleged in paragraph 1 of said complaint, but this defendant denies so much of said paragraph of said complaint as is in words and figures as follows, to-wit: "And plaintiff alleges that he
 11 has ever since been, and still is, the only person lawfully authorized to discharge the duties and enjoy the emoluments and privileges appertaining to said office."

III.

As to the allegations contained in paragraph 2 of said complaint, defendant denies that on the 27th day of March, 1903, or at any other time, he without authority of law and in violation of the rights of plaintiff, intruded himself into the said office of Assessor of Bernalillo County, New Mexico, and usurped the same and excluded the plaintiff therefrom.

IV.

This defendant admits that he has received and appropriated to his own use a part of the fees and emoluments of the said office, which accrued, were coming to and belonged to the lawful incumbent of said office, between the 27th day of March, 1903, and the 19th day of November, 1904, but denies that he has received all of the fees and emoluments which accrued to and which the lawful incumbent of said office was entitled to receive, between said dates, and alleges that all of said fees and emoluments have not yet been paid to defendant or any other person.

V.

Further answering defendant admits that a judgment was rendered in the said District Court for the said County of Bernalillo, on the 19th day of November, 1904, in that certain cause entitled, The Territory of New Mexico on the relation of Jesus M. Sandoval against George F. Albright, adjudging that this defendant was not entitled to said office and had usurped the same, and that said plaintiff was lawfully entitled to the same, but defendant does not admit that a
 12 copy of said judgment filed as "Exhibit A" to said complaint is a correct copy thereof, and calls for the production in evidence of the original judgment entered in said cause.

VI.

Defendant further alleges that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed assessor of the County of Bernalillo, and duly qualified as such by filing his bond and oath of office, *by* the Board of County Commissioners of Bernalillo County, acting under and by virtue of Section 3 of an Act of the Legislative Assembly of the Territory of New Mexico, entitled, "An Act to create the County of Sandoval, approved March 10,

1903," and as amended by an Act entitled, "An Act to amend Section 3 of an Act entitled, 'An Act to create the County of Sandoval,' approved March 12th, 1903."

VII.

Further answering, defendant alleges that the office of assessor of the County of Bernalillo became and was vacant by reason of said legislation and creation of the County of Sandoval, it having been previously a part of the County of Bernalillo; said legislation being for the purpose of dividing the County of Bernalillo and creating the County of Sandoval; that the Legislature had full power and authority to pass said acts and every part thereof, and thereby vest in the County Commissioners of the County of Bernalillo the power to appoint this defendant, or such other person as they saw fit to select, to the office of Assessor for the new County of Bernalillo, as the same existed from and after the date of the passage of said acts. Defendant further alleges that the office was subject to the control of the Legislature and that a vacancy thereafter was created by said acts above referred to.

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VIII.

Further answering, defendant alleges that by virtue of an Act entitled, "An Act to create the County of Sandoval, approved March 10, 1903," there was created the County of Sandoval in the Territory of New Mexico, and that the said plaintiff at the time of the creation of said County of Sandoval was and had been for a long time and many years previous thereto, a resident of the portion of Bernalillo County which was incorporated into and made the County of Sandoval, and that by virtue of the passage of the said acts creating the County of Sandoval, the said plaintiff became and was and still is a resident of the said County of Sandoval and not of the County of Bernalillo, and thereupon the said plaintiff ceased to be upon the passage of said acts a resident of the County of Bernalillo and was disqualified from exercising the duties of the office of assessor of the County of Bernalillo to which he had theretofore been elected, and at the time of the appointment and qualification of this defendant as such assessor, by virtue of his appointment by the Board of County Commissioners under and by virtue of the Act of the Legislative Assembly of the Territory of New Mexico, entitled, "An Act to amend an Act entitled, 'An Act to create the County of Sandoval, approved March 10, 1903,' approved March 12, 1903," such office was and had been since the date of the creation of the said County of Sandoval, vacant.

IX.

Defendant admits that as the incumbent of said office as aforesaid, between the 23rd day of March, 1903, and the 19th day of November, 1904, he received the sum of \$6,648.80 on account of fees and emoluments of said office, and denies that

14 he received any further sum; and further answering, defendant alleges that out of the sum so received during said period he paid out and expended the sum of \$2,142.25 for clerical and

other expenses necessarily incurred in administering said office, which said amount the said defendant is entitled to recoup and claim as a set-off against any demand which the plaintiff may have against him for fees and emoluments claimed by the said plaintiff collected by this defendant, even if the defendant was not and had not been the lawful incumbent of said office at the time said fees and emoluments were received and collected by him.

X.

As a further answer and defense to the said complaint, this defendant alleges that he became the actual incumbent of said office under the circumstances hereinbefore alleged and became such incumbent in good faith, believing he had a right thereto, and while he was the incumbent of said office of assessor of the said County of Bernalillo, between the 23rd day of March, 1903, and the 19th day of November, 1904, he paid, laid out and expended for clerical assistance and for deputies and for other necessary expenses incurred in administering said office and discharging the duties thereof, the sum of \$2,142.25, which said sum he sets up as a counter-claim and set-off against the amount demanded from him by said plaintiff, and prays the same be allowed him as a set-off and counter-claim against the amount of the fees and emoluments for which he may be held accountable to the said plaintiff on account of the said fees and emoluments, if any.

GEO. F. ALBRIGHT,

Defendant.

W. B. CHILDERS,

Attorney for Defendant.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

George F. Albright, being duly sworn, on oath deposes and says that he is the defendant in the above entitled cause; that he read the foregoing amended answer, knows the contents thereof, and that the same are true, except as to such matters and things as are therein stated to be on information and belief and those he verily believes to be true.

GEO. F. ALBRIGHT,

Subscribed and sworn to before me this 8th day of October, 1906,

THOS. K. D. MADDISON,

[NOTARIAL SEAL.]

Notary Public.

Endorsed: "Filed in my office this Oct. 10, 1906. John Venable, Clerk."

And thereafter, on, to-wit, the 13th day of October, 1906, there was filed in the office of the Clerk of said Court, in said cause, Plaintiff's Denial to Defendant's Amended Answer; which said Denial is in the words and figures following, to-wit:

Territory of New Mexico, Bernalillo District Court.

16

No. 6710.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

Plaintiff's Demurrer to Defendant's Amended Answer.

Comes now the plaintiff, by his attorney, and demurs separately to the several paragraphs of the amended answer of the defendant, as hereinafter stated for the reasons hereinafter set forth:

I.

To the first paragraph of said answer, because the allegation of the complaint attempted to be denied thereby is not an allegation of a traversable fact, but is mere inductment, and the said paragraph constitutes no defense to this action.

II.

To the second paragraph of said answer, because the defendant thereby attempts to deny the conclusion of law alleged in the complaint, while not denying the allegations of fact from which the said conclusion of law is deduced.

III.

To the third paragraph, because the denial therein contained is inconsistent with the admission contained in paragraph five of the answer, and is argumentative and an attempt to deny the allegation of a mere conclusion of law, without a denial of the facts from which such conclusion is deduced.

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IV.

To the fourth paragraph, because the same is not responsive to any allegation in the complaint, and constitutes no defense to this action.

V.

To the fifth, sixth, seventh and eighth paragraphs, separately, and to the allegations therein contained as a whole, because it affirmatively appears from the said allegation that the said defendant never was the lawful incumbent of the office of assessor of Bernalillo County; and it further appears from the allegations of the said paragraphs that there has been by the judgment of this honorable court a former adjudication against the contention of the said defendant as to all of the matters and things alleged and set forth in the said paragraphs, and the same do not, nor does any one of them separately, constitute any defense to this action.

VI.

To the ninth paragraph of said answer, because as to the admission by the defendant of the amount received by him, said admission is not responsive to the allegations of the complaint, and the said paragraph does not contain facts sufficient to constitute a defense to the claim of the plaintiff, or any part thereof.

VII.

To the tenth paragraph of said answer, in which the said defendant attempts to set up a counter-claim against the plaintiff, for the reason that the said paragraph does not state facts sufficient to constitute a cause of action or counter-claim against the plaintiff, and it affirmatively appears from the allegations of said answer 18 that the said defendant, at the time he claims to have paid, laid out and expended the moneys therein referred to, was a mere intruder in said office, without any color or right to the title thereto, and is therefore not entitled in law to recover any of the money so alleged to have been paid out.

VIII.

And the said plaintiff demurs to the said answer as a whole, because the same does not state facts sufficient to constitute a defense to this action, or a counter-claim against this plaintiff, for the various reasons pointed out as grounds of demurrer to the several paragraphs of said answer.

Wherefore, for want of a sufficient answer, plaintiff prays judgment.

NEILL B. FIELD,
Attorney for Plaintiff.

Endorsed: "Filed in my office Oct. 13, 1903. John Venable, Clerk."

And thereafter, on, to-wit, the 13th day of October, 1906, there was filed in the office of the Clerk of said Court, in said cause, plaintiff's reply to the Amended Answer of defendant; which said reply is in the words and figures following, to-wit:

Territory of New Mexico, Bernalillo District Court.

No. 6710.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

19

Reply.

The plaintiff for reply to the ninth paragraph of the amended answer of the defendant says:

I.

That the sum of six thousand, six hundred and forty-eight dollars and eighty cents (\$6,648.80), admitted by the said defendant to have been received by him on account of the office and emoluments of said office, between the 23rd day of March, 1903, and the 19th day of November, 1904, is in excess of the amount alleged in the complaint herein to have been so received, but the plaintiff prays leave to accept the said admission and that this reply may be treated as an amendment of his complaint, in so far as the allegation of the amount received by the said defendant is concerned, and this plaintiff says that he has no knowledge or information sufficient to form a belief as to what amount was expended by the said defendant for clerical and other expenses, necessarily incurred in administering said office. And this defendant says that if the amount so expended by the defendant in this cause be material, then he requires strict proof thereof.

II.

And by way of reply to the counter-claim set forth in paragraph ten of the answer of the said defendant, plaintiff denies that said defendant became the incumbent of said office in good faith, believing that he was entitled thereto, plaintiff says that he has no knowledge or information sufficient to form a belief as to whether or not the defendant paid, laid out and expended for clerical assistance, for deputies and for other necessary expenses incurred in administering the said office and discharging the duties thereof, the sum of Two Thousand, One Hundred and Forty-two Dollars and Twenty-five Cents (\$2,142.25), or any other sum. And the said plaintiff calls for strict proof thereof if the same be material in this cause.

NEHL B. FIELD,
Attorney for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss.:

Jesus M. Sandoval, being first duly sworn on his oath deposes and says that he is the plaintiff in the above entitled cause, that he has heard read the foregoing reply and knows the contents thereof, and the same is true of his own knowledge, except to such matters and things as are herein stated on information and belief, and as to those he verily believes the same to be true.

J. M. SANDOVAL.

Subscribed and sworn to before me by Jesus M. Sandoval, this thirteenth day of October, 1906.

[Seal of District Court.]

JOHN VENABLE,
Clerk, Bernalillo County, N. M.

Endorsed: "Filed in my office this Oct. 13, 1906. John Venable, Clerk."

And thereafter, on, to-wit, the 13th day of October, 1906, there was entered in the office of the Clerk of said Court, in said cause, an order sustaining in part and overruling in part the demurrer of plaintiff to defendant's Amended Answer; and also on the same day an entry was made on the record of said Court of the trial of said cause by a jury, and the verdict of the jury therein; which said order, entry and verdict are in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court,
September Term, Saturday, October 13th, 1906, Nineteenth Day.

No. 6710.

JESUS M. SANDOVAL
VS.
GEORGE F. ALBRIGHT.

This cause coming on to be heard on the Demurrer of plaintiff to defendant's Amended Answer herein, the Court, on consideration thereof, sustains the said Demurrer as to the 1st, 2nd, 3rd, 4th and 5th grounds, and overrules the said Demurrer as to the 6th, 7th and 8th grounds. Whereupon defendant excepts to that part sustained and plaintiff excepts to that part overruled.

Whereupon the original Answer and Motion to Strike Out parts of same are each withdrawn by agreement of counsel.

And now come the parties herein and are at issue; and a jury being called, come, to-wit:

Vidal Santillanes, Francisco Griego, Pablo Griego, Romulo Chavez, Jose de la Cruz, Jacob Loebbs, Modesto Serna, Louis Otero, Pablo Ansures, Pedro Griego y Apodaca, Albert Luna, Feliz Montoya, who are duly empaneled and sworn according to law.

And the jury having heard the evidence adduced by the parties herein and the argument of counsel, do by direction of the Court, return a verdict in writing signed by their foreman, to-wit:

"We, the jury, by the directions of the Court, say we find the issues for the plaintiff, and assess his damages in the sum of Five Thousand, Three Hundred and Sixty and 53-100 Dollars.

"PABLO GRIEGO, *Foreman*."

Thereupon counsel for the respective parties herein give notice of their intention to file Motions for a New Trial.

And thereafter, on, to-wit, the 13th day of October, 1906, there was filed in the office of the Clerk of said Court, in said cause, plaintiff's Motion for a new Trial; which said Motion is in the words and figures following, to-wit:

Territory of New Mexico, Bernalillo District Court.

No. 6710.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

23

Motion for New Trial.

Comes now the plaintiff, by his attorney, and moves the Court to set aside the verdict of the jury herein and grant him a new trial, for the following reasons:

I.

Because the Court erred in refusing to direct a verdict in behalf of the plaintiff for the sum of Six Thousand, Six Hundred and Forty-eight Dollars and Eighty Cents, (\$648.80), with interest, as requested by the plaintiff.

II.

The Court erred in permitting the defendant to give evidence of amounts expended by him for clerk hire, etc., during his incumbency of the office of assessor of Bernalillo County, and in permitting the defendant to deduct the amount of such expenditures from the amounts received by him as fees and emoluments of the said office.

III.

The Court erred in permitting the defendant to deduct the expenses of 1904 from the earnings of the year 1903, as shown by the testimony of the defendant in the case.

IV.

The Court erred in directing a verdict in favor of the plaintiff for five thousand, three hundred and sixty dollars and fifty-three cents (\$5,360.53), and in refusing to direct a verdict in favor of the plaintiff for seven thousand, five hundred and two dollars and
24 seventy-eight cents (\$7,502.78).

NEILL B. FIELD,
Attorney for Plaintiff.

Endorsed: "Filed in my office this Oct. 13, 1906. John Venable, Clerk."

And thereafter, on, to-wit, the 18th day of October, 1906, there was filed in the office of the Clerk of said Court, in said cause, defendant's motion for a new trial; which said motion is in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6710.

JESUS M. SANDOVAL
VS.
GEORGE F. ALBRIGHT.

Motion for New Trial.

Now comes George F. Albright, defendant in the above entitled cause and moves the Court to set aside the verdict of the jury and grant him a new trial, for the following reasons, to-wit:

I.

Because the Court excluded competent evidence offered by the defendant in said cause, to which he then and there excepted.

II.

25 Because the Court admitted improper evidence offered by the plaintiff, over the objection of the defendant, to which he then and there excepted.

III.

Because the Court improperly allowed interest in favor of the plaintiff upon certain amounts of fees received by the defendant, allowing interest to be calculated from dates anterior to any demand made upon the defendant for the payment of such fees and emoluments sued for and before the bringing of this suit.

IV.

Because the Court improperly instructed the jury to find any verdict whatever in favor of the plaintiff.

V.

Because the Court refused to instruct the jury to find a verdict in favor of the defendant.

VI.

Because the verdict is contrary to and not supported by the evidence.

VII.

Because the verdict is contrary to law.

As to the ruling of the Court hereinbefore referred to as grounds of this motion, defendant refers to the stenographer's notes and asks leave, when the same have been written out, to refer to the same and each and every exception taken by the defendant upon the

trial, and that the same shall be considered a part of this motion for a new trial.

Wherefore defendant prays the Court to set aside the verdict rendered in said cause and grant him a new trial.

W. B. CHILDERS,
Attorney for Defendant.

Endorsed: "Filed in my office this Oct. 18, 1906. John Venable, Clerk."

26 And thereafter, on, to-wit, the 25th day of October, 1906, there was entered of record in the office of the Clerk of said Court, in said cause, an order overruling the motions for new trial of plaintiff and defendant, respectively; also on the same day, the entry of judgment on the verdict, and an order granting an appeal to the Supreme Court of the Territory of New Mexico; which said orders and entry are in the words and figures following to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6710.

JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

Order.

This cause coming on to be heard on the motions of the plaintiff and defendant, respectively, to set aside the verdict of the jury herein and to grant a new trial, the Court now being sufficiently advised of and concerning the same, doth overrule each of the said motions; to which ruling of the Court the plaintiff and the defendant respectively except; and thereupon the plaintiff moved the Court for judgment on the verdict of the jury in this cause, which motion is granted.

Wherefore it is considered, ordered and adjudged by the court that the plaintiff, Jesus M. Sandoval, do have and recover of and from the said defendant, George F. Albright, the sum of Five Thousand, Three Hundred and Sixty Dollars and Fifty-three Cents (\$5,360.53), with interest thereon at the rate of six per cent, per annum from the 13th day of October, 1906, until paid, together with his costs in this behalf expended, to be taxed, and may have execution therefor.

27 And thereupon the defendant prayed an appeal to the Supreme Court of the Territory of New Mexico, and the plaintiff being present in open court by his attorney, it is ordered, adjudged and decreed that the said appeal be and the same is hereby granted upon defendant filing a good and sufficient bond as required by law, to be approved by the Clerk of this Court, and that said judgment be superseded to the termination of such cause in said Supreme Court

upon said appeal. And thereupon the plaintiff by his attorney prays a cross-appeal to the Supreme Court of the Territory of New Mexico, which is granted.

IRA A. ABBOTT, *Judge*.

Oct. 25, 1906.

And thereafter, on, to-wit, the 30th day of October, 1906, there was filed in the office of the Clerk of said Court, in said cause, a Supersedeas Bond; which said Supersedeas Bond is in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6710.

JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

28

Supersedeas Bond.

Know all men by these presents, That we, George F. Albright, as principal, and Frank A. Hubbell and W. H. Gillenwater, as his sureties, are held and firmly bound unto Jesus M. Sandoval in the penal sum of Eleven Thousand Dollars (\$11,000.00), for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Signed, sealed and dated this 23rd day of October, A. D. 1906.

The condition of the foregoing obligation is such that whereas on, to-wit, the 13th day of October, A. D. 1906, in the District Court of the Second Judicial District of the Territory of New Mexico, for the County of Bernalillo, the said Jesus M. Sandoval recovered a judgment against said George F. Albright for the sum of \$5,360.53 damages, and costs, and whereas the said George F. Albright as such defendant, has prayed for and obtained an appeal from said judgment to the Supreme Court of the Territory of New Mexico;

Now, therefore, if the said George F. Albright shall prosecute his said appeal to effect and abide by and pay the judgment and all costs which may be rendered or affirmed against him, then the above obligation to be null and void; otherwise to be and remain in full force and effect.

GEO. F. ALBRIGHT	[SEAL.]
FRANK A. HUBBELL	[SEAL.]
W. H. GILLENWATER	[SEAL.]

TERRITORY OF NEW MEXICO.

County of Bernalillo, ss.

29

On this 29th day of October, A. D. 1906, before me personally appeared George F. Albright, principal, and Frank A. Hubbell and W. H. Gillenwater, sureties upon the above and

foregoing bond, and they each acknowledged to me that they executed the same as their free act and deed.

And the said Frank A. Hubbell and W. H. Gillenwater, sureties upon said bond, being by me each severally sworn, did say, each for himself and not one for the other, that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities and property exempt from execution and forced sale.

Frank A. Hubbell.....	\$5,500.00
W. H. Gillenwater.....	5,500.00

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

THOS. K. D. MADDISON,

[NOTARIAL SEAL.]

Notary Public.

The above and foregoing bond, as to form and sufficiency approved by me this 30th day of October, 1906.

By the Court,

JOHN VENABLE,

Clerk of said Court.

Endorsed: "Filed in my office this Oct. 30, 1906. John Venable, Clerk."

And thereafter, on, to-wit, the 14th day of December, 1906, there was filed in the office of the Clerk of said Court, in said cause, 30 the Bill of Exceptions, which said Bill of Exceptions is in the words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6710.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

Bill of Exceptions.

Be it remembered, That upon the trial had in the above entitled cause the following proceedings among others were had, and which not being of record, at the request of the defendant are included in a Bill of Exceptions, in words and figures as follows, to-wit:

Territory of New Mexico, in the District Court, Bernalillo County.

No. 6710,

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

Trial.

By jury, before Honorable Ira A. Abbott, Judge, presiding,
31 at Albuquerque, New Mexico, on October 13, 1906.

Mr. Neill B. Field appeared for the plaintiff;

Mr. William B. Childers appeared for the defendant.

A jury was empanelled and sworn, without exception by either party, when the following proceedings were had:

Mr. FIELD: The plaintiff asks the Court to instruct the jury to find a verdict for the plaintiff in the sum of six thousand, six hundred and forty-eight dollars and eighty cents, being the amount admitted by the defendant in his answer to have been received by him, between the 23rd day of March, 1903, and the 19th day of November, 1904, as the emoluments of the office of assessor of Bernalillo County.

Mr. CHILDERS: To which the defendant objects, on the ground that there is a plea of set-off in the case, which the Court has admitted to be a good plea, and we ask to make proof thereunder.

The COURT: The motion is overruled.

Mr. FIELD: Plaintiff excepts. That is all at this time.

Defendant's Case.

Mr. CHILDERS: I offer in evidence the act of the Legislative Assembly of the Territory of New Mexico, approved March 10th, 1903, entitled, "An Act to create the County of Sandoval;" and also an act to amend Section 3 of the act entitled, "An Act to create the County of Sandoval, approved March 12, 1903."

Mr. FIELD: To which I object, for the reason that these are public acts of which the Court takes judicial notice, and second,
32 for the reason that they do not tend to illustrate any of the issues involved in this case.

Mr. CHILDERS: I understand that they are public acts, but I want them in the record.

The COURT: I will sustain the objection.

Mr. CHILDERS: The defendant excepts.

ARTHUR E. WALKER, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. State your name and official position?

A. Arthur E. Walker, Clerk of the Probate Court and ex-Officio

Recorder of the County of Bernalillo, and Clerk of the Board of County Commissioners.

Q. Please turn to the journal of the Board of County Commissioners for the month of March, 1903—What is that book?

A. Journal of proceedings.

Mr. FIELD: I suggest that Mr. Walker can copy that and it can be inserted in the record.

Mr. CHILDERS: I offer in evidence the record of the Board of County Commissioners of date March 23, 1903, beginning on page 449 and ending on page 450, appointing George F. Albright, assessor, book C, of the minutes of the Board of County Commissioners.

Mr. FIELD: To which plaintiff objects, for the reason that the record offered in evidence constitutes no evidence of title in defendant to the office in question, and that his title to the office as shown by the pleadings in this case has been finally adjudicated contrary to his right.

The COURT: This is an objection which you expect the Court to sustain?

33 Mr. CHILDERS: Certainly: I expect that.

The COURT: Sustained.

Mr. CHILDERS: Defendant excepts.

(Said record is referred to as defendant's Exhibit A, for insertion in this record.)

Mr. CHILDERS: I offer in evidence the oath of office and bond. I suppose they may be considered in.

It is agreed by counsel that they may be supplied, being the bond and oath of office filed in pursuance of that appointment; filed in the month of March, 1903.

Mr. FIELD: To which the plaintiff objects for the same reason.

The COURT: Sustained.

Mr. CHILDERS: Exception.

(Said oath of office and bond are referred to as defendant's exhibits B and C, for insertion in this record.)

GEORGE F. ALBRIGHT, introduced in his own behalf as a witness, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. You are defendant in this case?

A. Yes, sir.

Q. State if you filled the office of assessor from the time of appointment—from the time you qualified in March, 1903—March 23rd, 1903.

A. Yes, sir.

Q. To the 19th day of November, 1904?

A. Yes, sir.

Q. In your answer here you stated that you received during those periods \$6,648.80. I will ask you what amount of money did you pay out for expenses—for deputies, clerk hire and office expenses—while you were the incumbent of that office—between those dates?

Mr. FIELD: I object. First, because there is no allegation in the answer of the defendant that he paid out any money in good faith, believing himself to be entitled to the office of assessor, and, second, because if there were any such allegation in the answer, proof of what he paid out would not be admissible, in view of the fact that he has been adjudged to be an usurper.

Mr. CHILDERS: I suppose that is what the Court passed upon in the demurrer.

The Court: Yes; except he says you are not in good faith holding the office.

Mr. CHILDERS: The defense sets it up, and if it does not I would ask leave to interline it.

The Court: I think it should show that.

Mr. CHILDERS: I will ask leave to interline that. I might have overlooked that. I ask permission to interline that.

Mr. FIELD: With the understanding that I be allowed to interline my reply so as to cover or traverse it. I do not consent to it, and I do not make any objection to it.

The Court: Permission is granted to amend.

(Counsel proceed to amend their pleadings accordingly.)

Mr. FIELD: The answer having been amended to meet part of the objection, I now renew the remainder of the objection.

The Court: The objection is overruled.

Mr. FIELD: Plaintiff excepts.

A. I cannot give it to you except as stated in the pleadings.

Q. You figured this amount out?

35 A. I figured this amount out as between those dates sued for—when it was received—between those dates sued for—twenty-one hundred and forty-two dollars and twenty-five cents.

Q. Is that correct?

A. Yes, sir; that is correct.

Q. For what kind of expenses was that sum paid between those dates?

Mr. FIELD: I object. It is wholly immaterial for what they were paid.

The Court: Overruled.

Mr. FIELD: Plaintiff excepts.

A. They were paid for a deputy kept in the office all the while during that time, and for assistant deputies on the outside during the time of making assessments.

Q. State whether or not those were necessary expenses in the administration of the office?

Mr. FIELD: I object to that as calling for an opinion. He can state what these people did.

The Court: I suppose in a small county they might not be needed, while in a large one they would be. It seems to me that it is a matter of somebody's judgment whether they should be required or not, depending upon the size of the county and the amount of

work to be done. In some counties the assessor might do it all probably. I overrule the objection.

Mr. FIELD: The plaintiff excepts.

A. In a county of this size and the amount of work, it is impossible from the dates—between the time of taking the assessment and making up the rolls—for one man to do it; he has absolutely got to have help.

Q. Do you know what amount of money had been paid out
36 in the preceding term of office for such assistance had?

Mr. FIELD: I object to that as cross examination and as not material.

The COURT: I do not think it is admissible.

Mr. CHILDERS: I think that is all I wish to ask the witness.

Cross-examined by Mr. FIELD:

Q. Mr. Albright, six thousand, six hundred dollars—six hundred odd dollars—which you say you received during this period, was all for the fees and emoluments of the office arising during the year 1903, was it not?

A. During the year 1903? I think there is a portion there of 1904.

Q. What portion for 1904?

A. Well, that I would have to separate.

Q. I want you to do that. I asked you to do that the other day—

A. I think that includes everything between the dates your suit calls for.

Q. I want to know, if you can tell, how much money you received as the fees and emoluments of the office of assessor for the year 1903. That is what you are sued for.

A. (Witness making calculation.) Three hundred and seventy-two dollars and ninety cents are fees for 1904.

Q. Now give me the names of the persons that you employed to assist you in making the assessment in the year 1903, and the various sums paid by you to each of them?

A. In 1903?

Q. Yes.

37 A. J. R. Carpenter—

Q. How much?

A. Twenty-four dollars.

Q. What did he do?

A. He made assessments in the outside counties—outside precincts; in the mountain precincts.

Q. Well?

A. J. B. Lucero; fifteen dollars.

Q. The same character of work?

A. Yes, sir; and Thomas Werner, ten dollars.

Q. The same kind of work?

A. Yes, sir.

Q. What else?

A. And there was seventy-five dollars to Luber—I do not remember his initials—for typewriter work——

Mr. CHILDERS: He was here in the District Clerk's office?

A. Yes, sir.

Q. What kind of typewriting work?

A. On the rolls; helping make up the rolls.

Q. Well?

A. That was all the outside deputies; the rest was the regular clerk hire for the year.

Q. To whom was that money paid, and who were the regular clerks?

A. Mr. Garcia was the regular clerk; Jesus Garcia.

Q. How much did you pay him?

A. I paid him at the rate of one thousand dollars a year.

Q. Anybody else?

A. No, sir.

Q. Then, tell the jury what proportion, or what proportion
38 of the sum of \$2,142.25 was paid out by you on account of assistance in making the assessment for the year 1903?

A. Eleven hundred and twenty-eight dollars.

Q. The balance of the \$2,142.25 was all expended by you in connection with the making of the assessment of 1904?

A. Yes.

Q. While the sums received by you and stated in your answer to be \$6,648.80, but \$372.90, were for fees—for services rendered in 1904?

A. Yes, sir.

Q. Is that right?

A. That is right.

Q. Now, can you tell the jury when you received the various sums of money going to make up that \$6,600—the sum stated?

A. Yes, sir.

Q. Please do so?

A. April 1, fees on licenses, \$3.50; same date, commission on poll books, \$48.50; May 1, fees on licenses, \$23.50; June 1, fees on licenses, \$9.50; July 1, fees on licenses, \$13.95—that should be \$13.50; July 1, poll books and postage, \$33.80—but that postage has been deducted from the amount—that \$33.80—I will give you the exact figures on that (calculating); there was \$6.65 to be deducted from that \$33.80——

Q. That would make \$27.15——

A. \$27.15; then, July 1, commissions on first and second quarter of licenses, \$86.40; August 1, fees on licenses, \$16.00; September 1, fees on licenses, \$20.50; October 1, fees on licenses, \$42.50; October 1, commissions on licenses, \$56.90; November 1, fees on licenses, \$23.00; December 1, fees on licenses, \$10.50; January 1,
39 1904, fees on licenses, \$20.50—that would be for the month of December, 1903——

Q. How much?

A. \$20.50. The same date, commission on licenses, \$45.45. Now, January 1—January 5th, rather, 1904—commission on taxes, \$3,068.28; February 1, fees on licenses, \$24.00; March 1, fees on

licenses, \$4.50; April 1, commissions on licenses, \$40.20; April 1, poll tax books, \$65.00; April 25, commission on taxes, \$73.13—

Q. These are taxes for the year 1903?

A. Yes, sir—and the same date, fees on licenses, \$23.50; and May 1, fees on licenses, \$8.00, and May 24th, commissions on Territorial taxes, \$40.66—

Q. They are taxes for 1903?

A. Yes, sir—June 1, fees on licenses, \$7.50; July 1, fees on licenses, \$11.50; July 1, commissions on licenses, \$25.00; August 1, fees on licenses, \$40.50; July 1, commission, Territorial taxes, \$722.39; same date, commission on county taxes, \$930.00; same date, commission on city taxes, \$849.07; September 1, fees on licenses, \$11.50; October 1, fees on licenses, \$11.50; October 4, commission on licenses, \$50.60; same date, commission on taxes, \$177.83—

Q. They are taxes for 1903?

A. Yes, sir.

Q. What is that amount?

A. One hundred and seventy-seven dollars and eighty-three cents. And November 1, fees on licenses, \$9.00, and November 14th, fees on licenses, \$8.50.

Mr. FIELD: That is all.

Redirect examination by Mr. CHILDERS:

Q. When you accepted this appointment, state whether or not you had legal advice of the power of the Legislature of New Mexico to enact the legislation under which you were appointed, and as to the power of the Board of County Commissioners to make this appointment?

A. I had.

Q. And you acted under that legal advice?

A. I acted on that legal advice.

Q. After that, I will ask you to state whether or not you had a decision of the District Court in your favor in a suit brought to determine—

Mr. CHILDERS: I believe I will offer the record instead. I will now offer the record in this case: it being the case of the Territory of New Mexico, on the relation of Jesus M. Sandoval, defendant in error, against George F. Albright, plaintiff in error. The transcript which I have here was used in the Supreme Court of the Territory.

Mr. FIELD: On both reviews?

Mr. CHILDERS: I think on both; yes, this is both reviews.

(Printed record referred to as Exhibit D, as a part of this record.)

Recross-examination by Mr. FIELD:

Q. You were a member of the Legislature that passed the act creating the County of Sandoval and the amended act referred to, were you not?

A. Yes, sir.

Q. Your term as a member of the Legislature had not expired when you received this appointment, had it?

A. Well, for all intents and purposes it had, as I understand it.

Q. You were elected for two years, were you not?

A. But there is nothing that I know of in the statutes calling for more than a sixty days' session.

41 Q. I did not ask you whether you had more to do; but whether your term expired?

Mr. CHILDERS: I think that is a question of law.

A. Well, the common form of speaking of it—of course a man's election is supposed to be for two years.

Q. When you were appointed to this office of assessor by the Board of County Commissioners, you knew that Mr. Sandoval disputed your right to the appointment, and the power of the Legislature to pass the act, didn't you?

A. I do not believe I had been served with any such notice at that time—I had not been served with any such notice at that time; that is, as I remember.

Q. Did you believe that Mr. Sandoval was going to surrender this office up to you without a fight at the time you were appointed by the Board of County Commissioners?

A. I was acting on the advice of attorneys that the office was legally created.

Q. I would like to have you answer my question, whether or not you didn't know that it was the purpose of Mr. Sandoval to contest your right to this office at the time you were appointed?

Mr. CHILDERS: I object to the question as immaterial and irrelevant.

The COURT: He had not answered the previous question to which you did not object. The previous question may be read to him and he may answer it.

Q. (Previous question repeated.)

A. I had no way of knowing what Mr. Sandoval was going to do.

Q. Now, is it not a fact that you got possession—actual possession—of the office by inducing Jesus Garcia, who was in the
42 employ of Sandoval, to accept employment from you and to recognize you as assessor?

A. No, sir.

Q. How did you get possession of the office?

A. By the order of the County Commissioners, he turned the office over to us.

Q. Who turned it over?

A. Mr. Garcia, acting on the order of the Commissioners. He was in charge of the office.

Q. And contrary, as you knew, to Mr. Sandoval's instructions, who was his employer?

A. That I do not know; no, sir.

Q. Then Mr. Garcia at once entered upon your employ?

A. No, sir; he didn't enter at once. He didn't enter at once upon my employ.

Q. How long was it before he entered in your employ?

A. It was two or three weeks.

Q. You are sure of that, are you?

A. I am reasonably certain; yes, sir.

Q. He stayed in the office all the time, didn't he?

A. No, sir.

Mr. FIELD: That is all.

Mr. CHILDERS: That is all.

JESUS M. SANDOVAL introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. CHILDERS:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Are you a married man or a single man?

A. I am married.

Q. Where was your residence with your family on the 10th
43 and 12 days of March, 1903?

Mr. FIELD: Objected to as wholly immaterial and not within any issue in this case.

Mr. CHILDERS: I propose to prove by this witness that he lived in that part of the County of Bernalillo which was cut off to make the County of Sandoval, and that he never did remove into the County of Bernalillo, as then left by this legislation and take up his residence there.

Mr. FIELD: I will withdraw the objection. He can prove that if he can.

A. My family was here in Albuquerque, and I was outside.

Q. How long had they been here?

A. I do not remember very well, but I think that they had been here for about a month.

Q. You didn't have any residence here in the town of Albuquerque, did you?

A. I had; my family was here.

Q. Is it not a fact that your family was boarding here in town?

A. Yes, sir.

Q. And is it not a fact that they went back to the residence in the County of Sandoval after the 23rd day of March, 1903?

Mr. FIELD: How long after?

Q. Immediately after?

A. No.

Q. When did they go back there to live?

A. No, sir; they remained here for quite a long time—for over two months.

Q. What months were they?

A. I think they remained here during the months of March, April and a part of May.

44 Q. Your residence is in Sandoval County at the present time?

A. Yes, sir; now.

Q. What precinct of Sandoval County did you live in when you were elected to the office of assessor in the fall of 1902?

Mr. FIELD: I object to that as wholly immaterial. I will renew my objection now as to where he lived when he was elected assessor.

The Court: Objection sustained.

Mr. CHILDERS: I propose to prove by the witness that he lived and voted in 1902—the time—the day on which he was elected assessor, in precinct—I think of Corrales, in the County of Sandoval, as created by the act of the Legislature of March 10th, and March 12, 1903, and except to the ruling.

Q. Have you ever voted outside of that precinct of Corrales?

Mr. FIELD: I object to that—

Q. In the last five or six years?

Mr. FIELD: Objected to.

The Court: Objection sustained.

Mr. CHILDERS: I propose to prove by the witness that he has never voted outside of those precincts since he was elected at the election in 1902, to the office of assessor of the County of Bernalillo, and that precinct—Corrales precinct—is now a part—was made a part of the County of Sandoval by the acts of the Legislature which are in question. I except to the ruling.

Cross-examined by Mr. FIELD:

Q. I will ask you if it is not true that by the advice of your counsel, as soon as you heard of the passage of the act creating the County of Sandoval, you brought your family and made your home
45 in good faith within the County of Bernalillo, and that you remained there until your counsel told you it was no longer necessary for you to so remain?

A. Yes, sir.

Mr. FIELD: That is all.

Redirect examination, by Mr. CHILDERS:

Q. Did you leave before or after the act of the Legislature was passed affecting the office of assessor?

A. I am not positive, but I think I moved here about three days before the act was approved.

Mr. CHILDERS: That is all.

Mr. CHILDERS: That is the case for the defendant.

Mr. FIELD: Now, I will renew my motion, and will ask the Court to direct the jury to find a verdict for \$6,648.80, with interest on \$3,068.28 of that amount from the 5th day of January, 1904, until this date, and upon—I will give the stenographer the exact amount as testified to—from the first day of July, 1904, until this date.

I assume from your Honor's previous ruling that you will overrule that, and I desire to save an exception after you do.

(After argument on question of computation of interest.)

Mr. FIELD: I will ask leave to recall Mr. Albright.

GEORGE F. ALBRIGHT, recalled by plaintiff, testified further as follows:

Direct examination by Mr. FIELD:

Q. Mr. Albright, you testified on your direct examination as to the expenses that were necessarily incurred in performing the duties of this office. I will ask you whether or not it was necessary
46 for the assessor of Bernalillo County to employ deputies in order to enable him to take care of the business of issuing licenses?

A. During the period of above five months in the year it would not be necessary.

Re-examined by Mr. CHILDERS:

Q. I would ask you if you know how the office was run before you took charge of it?

Mr. FIELD: I object to it; it can make no difference.

Q. Whether the convenience of the public would not require a deputy in this office?

Mr. FIELD: I object.

The COURT: As to the first question asked, I will sustain the objection.

Mr. CHILDERS: I considered the first question withdrawn.

Q. I ask you whether or not the convenience of the public does not require a deputy in the office?

A. It does require a deputy in the office, always.

The COURT: That I admit.

Re-examined by Mr. FIELD:

Q. Well, what is to prevent the assessor from being in the office all the time except about five months in the year?

A. Nothing, I suppose.

(After further argument upon the question of interest.)

Mr. FIELD: I ask for interest only on the two large sums; on the payment of January 5, and on the payment of July 1, from the date that those payments were received.

The COURT: I think this is different than an account,
47 which is by agreement of the parties. This is against the will of one party, and I think interest should start from the time when he had the money to withhold, and held it.

Mr. CHILDERS: Then, when will you allow the payments, or credits; under what date—those expenses?

The COURT: Of course, the credits would have to be allowed as soon as they were made—as soon as he paid out money.

Mr. CHILDERS: These were continuing payments?

The COURT: For convenience you will have to take one or two points—January and July probably would serve.

Mr. FIELD: I will call Mr. Wilkerson, who has calculated the interest.

THOMAS N. WILKINSON, introduced as a witness by plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. FIELD:

Q. Have you calculated the interest on \$3,068.28 from January 5th, 1904, to this date?

A. I did.

Q. How much is it?

A. \$516.24.

Q. Have you calculated the interest on \$2,511.46, from July 1, 1904, to this date?

A. I did.

Q. How much is it?

A. \$337.64.

Q. What is the total of the interest?

A. \$853.88.

Cross-examined by Mr. CHILDERS:

Q. Did you give the date—the time. Give the time?

48 A. I figured on the \$3,068.28 from January 5, 1904, up to the present time—up to date—and the other amount from July 1, 1904, up to this date. I figured the first two years, nine months and about five days.

Mr. FIELD: I suppose the Court is going to instruct the jury to return a verdict for the amount shown, \$5,360.53, allowing the total amount of the claim of payments; that is, as I understand your Honor to have ruled. I asked the Court to direct a verdict for the amount, \$6,648.80, with interest, which was overruled, and I except. And it followed from the action of the Court that you would do this other thing, and the Court of its own motion directed the verdict, and I except. I except because it is not for the full amount as shown on the pleadings I was entitled to.

Mr. CHILDERS: I except because it includes interest prior to the time of bringing the suit, and the time of the demand, and except generally, because the plaintiff is not entitled to a verdict.

The Court: Gentlemen of the Jury. This verdict is rendered upon the questions of law involved in the case and by direction of the Court.

Mr. FIELD: I think the verdict should be read to the jury.

The Court (Reading verdict): "We, the jury, by direction of the Court, say we find the issues for the plaintiff, and assess his damages at the sum of five thousand, three hundred and sixty dollars and fifty-three cents. Pablo Griego."

Mr. CHILDERS: Of course I except, and give notice of motion for a new trial.

Mr. FIELD: So do I.

Case closed.

49

EXHIBIT A.

At an adjourned session of the Board of County Commissioners of Bernalillo County, New Mexico, held on the 23rd day of March, 1903, Hon. T. C. Gutierrez, presiding, the following among other proceedings were had and entered of record:

Whereas, there is a vacancy in the office of assessor for the County of Bernalillo, by virtue of the act of the Legislative Assembly of the Territory of New Mexico, approved on the 10th day of March, A. D. 1903, and an act amendatory of said act, approved on the 12th day of March, A. D. 1903; and, whereas, said last mentioned act authorized this Board of County Commissioners to fill said vacancy by appointing an assessor for the said County of Bernalillo as now constituted by virtue of said acts of the Legislative Assembly of the Territory of New Mexico:

Be it Resolved, That George F. Albright be and he is hereby appointed County Assessor for the said County of Bernalillo, to serve until his successor is elected at the next General Election to be held in said county for the election of county officers, and qualified; and the said George F. Albright is hereby authorized to discharge the duties of said office so soon as he shall qualify as required by law.

And thereupon the said George F. Albright presents his bond in the sum of \$2,000, the American Bonding Company of Baltimore, Md., as surety, which bond the Board approves, and the said George F. Albright was duly sworn in.

50

EXHIBIT B.

(Copy.)

Oath of Office.

TERRITORY OF NEW MEXICO.

County of Bernalillo, ss:

I, George F. Albright, having been appointed to the office of Assessor in and for the County of Bernalillo, Territory of New Mexico, do solemnly swear that I am not the holder of any public moneys due to the Territory of New Mexico, or any county thereof, which is unaccounted for; and that I will support the Constitution of the United States and faithfully and legally discharge the duties of said office to the best of my ability, so help me God.

GEORGE F. ALBRIGHT.

Subscribed and sworn to before me this 23rd day of March, A. D. 1903.

[PROBATE COURT SEAL.]

J. A. SUMMERS,

Probate Clerk.

Endorsed: "Filed in this office March 23, 1903. J. A. Summers, Clerk."

EXHIBIT C.

Know all men by these presents, that we, George F. Albright, as principal, and The American Bonding Company of Baltimore, City of Baltimore, Md., as Surety, are hold and firmly bound
 51 unto the Territory of New Mexico, in the sum of Two Thousand Dollars (\$2,000.00), for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, severally and jointly by these presents.

Signed, sealed and dated this the 23rd day of March, A. D. 1903.

The condition of the above and foregoing obligation is such that, whereas, George F. Albright, the above bonded principal, was by an order made and entered of record by the Board of County Commissioners of the County of Bernalillo, New Mexico, on the 23rd day of March, 1903, duly appointed to the office of County Assessor of the County of Bernalillo, New Mexico, to fill the vacancy in said office existing until the election and qualification of his successor to be elected at the next general election for county officers in said County; and whereas, by law, as such County Assessor, the said George F. Albright is required to give a good and sufficient bond in the sum of two thousand dollars;

Now, therefore, if the said George F. Albright, the above bonded principal, shall promptly, faithfully and impartially discharge the duties of his office, as such Assessor of the County of Bernalillo, aforesaid, then this obligation to be null and void, otherwise to remain in full force and effect.

This bond is issued upon the further condition that the said Surety can cancel same as to all subsequent liability which may accrue after the service of a notice upon the obligees herein by registered mail in a letter addressed to the County Commissioners of Bernalillo County, Territory of New Mexico, said notice to be
 52 considered served upon the delivery of same to the County Commissioners of Bernalillo County, Albuquerque, New Mexico.

[CORPORATE SEAL.]

GEORGE F. ALBRIGHT [SEAL.]
 AMERICAN BONDING COMPANY
 OF BALTIMORE.

By WM. B. CHILDERS, *Vice President*.

Attest

F. H. KENT,

Asst Sec.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

Be it remembered that on this 23rd day of March, 1903, before me, the undersigned, personally appeared George F. Albright, the principal of the above and foregoing bond and obligation, and he ac-

knowledge to me that he executed the same for the uses and purposes herein mentioned, and that the same was his free act and deed.

In Witness Whereof, I have set my hand and affixed the official Seal of the Court of which I am Clerk, the day in this acknowledgment first above written.

[COURT SEAL.]

W. E. DAME,

*Clerk of the District Court, 2d Judicial
District, Ty. of New Mexico.*

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

On this 23rd day of March, A. D. 1903, before me, the subscribed
Clerk of the District Court, 2d Judicial Dist., Ty. of New
53 Mexico, for the Territory of New Mexico, residing in the
City of Albuquerque, came Wm. B. Childers, Vice President
of the American Bonding Company of Baltimore, City of Baltimore,
Md., to me personally known to be the Vice President of the said
American Bonding Company of Baltimore, of Baltimore City, a corporation described in and which executed as surety the annexed
bond, and being by me first duly sworn, stated, that F. H. Kent is
Assistant Secretary of the American Bonding Company of Baltimore, and that the said Wm. B. Childers as Vice-President, and
F. H. Kent as Assistant Secretary, duly executed the preceding instrument by order and authority of the Directors of the said American
Bonding Company of Baltimore; and that the seal affixed to
the preceding instrument is the Corporate Seal of the said Company; that the said Corporate Seal was duly affixed by authority of
the Directors of the said Company; that the said American Bonding
Company of Baltimore, of the State of Maryland, is duly and legally
incorporated under the laws of the State of Maryland, is authorized
under its charter to transact and is transacting business of a Surety
Company in the Territory of New Mexico; that said Company has
complied with all the laws of the Territory of New Mexico relating
to Surety Companies doing business in that Territory; and is duly
licensed and legally authorized by such State to qualify as sole
surety on the bond hereto annexed; that the said Company is authorized by its Articles of Incorporation, and by its By-Laws, to execute the said bond; and that said Company has assets consisting of
Capital Stock paid in cash and surplus over and above all its liabilities of every kind, exceeding the sum of One Million Dollars
(\$1,000,000.00), and that said Wm. B. Childers as Vice
54 President and F. H. Kent as Assistant Secretary of the said
Company have been duly authorized by the Board of Directors of the Company to execute the foregoing bond.

WM. B. CHILDERS,

Vice President.

Subscribed to and sworn to before me, this 23rd day of March,
A. D. 1903.

[COURT SEAL.]

W. E. DAME,

*Clerk of the District Court, 2d Judicial
Dist., Ty. of New Mexico.*

Approved by the Board of County Commissioners on this the 23rd day of March, A. D. 1903.

T. C. GUTIERRES, *Chairman*,
A. HARSCH,
SEVERO SANCHEZ.

Said Bond is endorsed as follows:

TERRITORY OF NEW MEXICO.

County of Bernalillo, ss:

This instrument was filed for record on the 23rd day of March, 1903, at 4 o'clock p. m.

Recorded in Vol. "A" of O. B. records of said County, folio 406
[COURT SEAL.] J. A. SUMMERS, *Recorder*.

55

EXHIBIT D.

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. 1064.

TERRITORY OF NEW MEXICO ex Rel. JESUS M. SANDOVAL, Defendants
in Error,

vs.

GEORGE F. ALBRIGHT, Plaintiff in Error.

Writ of Error to the District Court, Bernalillo County.

Transcript of Record.

W. B. Childers, Attorney for Plaintiff in Error

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. 1064.

56 TERRITORY OF NEW MEXICO ex Rel. JESUS M. SANDOVAL,
Defendants in Error,

vs.

GEORGE F. ALBRIGHT, Plaintiff in Error

Writ of Error to the District Court, Bernalillo County.

Transcript of Record and Proceedings in Case No. 6395

Be it remembered that heretofore, on to-wit, the 21st day of November, 1904, there was filed for record in the office of the Clerk of the District Court a Writ of Error issued out of the Supreme Court of the Territory of New Mexico, in the cause of the Territory of New

Mexico ex rel. Jesus M. Sandoval, defendant in error, vs. George F. Albright, plaintiff in error, commanding the Clerk of the Second Judicial District Court to certify the record and proceedings in a case lately therein pending, entitled: "Territory of New Mexico ex rel. Jesus M. Sandoval, plaintiff, vs. George F. Albright, defendant," which said Writ of Error is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

To the District Court of the Second Judicial District of the Territory of New Mexico, Sitting Within and for the County of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of judgment, in a certain cause lately pending before you, wherein the

57 Territory of New Mexico ex rel. Jesus M. Sandoval was plaintiff, and George F. Albright was defendant, error has intervened as it is said, to the damage of the said George F. Albright, defendant, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the Supreme Court of the Territory of New Mexico, together with this writ, so that you have the same in the said Supreme Court on the first day of the next term thereof, to be begun and held on the first Wednesday after the first Monday in January, A. D. 1905, at Santa Fe, in said Territory, in pursuance of law.

Witness, the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the seal of the said Court, this 19th day of November, A. D. 1904.

JOSE D. SENA, *Clerk*.

(Endorsed:) "Filed in my office the 21st day of November, 1904. W. E. Dame, Clerk."

Be it remembered that heretofore, to, to-wit, the 20th day of July, 1903, there was filed in the office of the clerk of the District Court of the Second Judicial District of the Territory of New Mexico, sitting within and for the County of Bernalillo, a motion for a rule in a certain cause entitled, The Territory of New Mexico on the relation of

58 Jesus Maria Sandoval, versus George F. Albright, which said motion is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo County District Court, March Term, A. D. 1903.

THE TERRITORY OF NEW MEXICO on the Relation of JESUS MA.
SANDOVAL

vs.

GEORGE F. ALBRIGHT.

Motion for Rule.

Now comes Edward L. Bartlett, Solicitor General of the Territory of New Mexico, on behalf of the people thereof, and files the affidavit of Jesus Ma. Sandoval and moves the Court for a rule to be made on George F. Albright, of Bernalillo County aforesaid, to show cause if any he has, why he, the Solicitor General, should not have leave to file the information in the nature of a quo warranto in this Court, on behalf of the people of the Territory of New Mexico on the relation of Jesus Ma. Sandoval against said George F. Albright for having unlawfully usurped and intruded into and for unlawfully executing and holding and performing the duties of the office of Assessor of Bernalillo County, New Mexico.

EDWARD L. BARTLETT,

Solicitor General of the Territory of New Mexico.

Endorsed: "Filed in my office this July 20th, 1903. W. E. Dams, Clerk."

59 And thereafter, to-wit, on the 20th day of July, 1903, there was filed in the office of the Clerk of said Court in said cause, the affidavit of Jesus M. Sandoval, which said affidavit is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO,

County of Bernalillo:

Jesus Ma. Sandoval, of lawful age, being first duly sworn, on his oath deposes and says, that at the general election held in the Territory of New Mexico on the 4th day of November, 1902, he was duly elected to the office of Assessor of Bernalillo County for the term of two years, from the 1st day of January, 1903, and until his successor is duly elected and qualified; that he received from the proper officers of Bernalillo County a certificate of said election and thereafter and within the time prescribed by law he duly qualified as such Assessor by taking the oath and executing the bond prescribed by law, and entered upon the discharge of the duties of said office, and ever since has been and still is the only person lawfully authorized to discharge the duties and to enjoy the emoluments and privileges appertaining to said office; that he has never resigned the said office, nor has the same been abolished, nor has he been removed therefrom by any competent authority, and the term for which he was elected will not expire until the 1st day of January, 1905. That the fees

and emoluments of said office are of great value, to-wit, of the value of six thousand dollars per annum, and affiant has a vested interest in said fees and emoluments of which he can not be lawfully deprived without due process of law, and that said office has not
 60 been at any time since affiant entered upon the discharge of the duties thereof, vacant or without an incumbent competent and qualified to discharge the duties and transact the public business appertaining thereto.

Affiant further states that the Board of County Commissioners of Bernalillo County, pretending to act as affiant is informed under the authority of the provisions of an act of the Legislative Assembly of the Territory of New Mexico, entitled, "An Act to Create the County of Sandoval," approved March 10th, 1903, as the same was amended by an act entitled, "An Act to Amend Section 3 of an Act Entitled An Act to Create the County of Sandoval," approved March 12th, 1903, did on the 27th day of March, 1903, attempt and pretended to appoint one George F. Albright to be Assessor of the County of Bernalillo aforesaid for the portion of the term of this affiant which had not and has not expired, and on the same day the said George F. Albright by stealth and fraud, claiming to act under said pretended appointment, unlawfully took possession of the room in the Court House of said County assigned to the use of the Assessor, and also took possession of the books, papers and other insignia of the said office, and has ever since claimed and assumed to be the Assessor of said County and usurps the said office and excludes this affiant therefrom, and unlawfully receives and appropriates to the exclusion of this affiant the fees and emoluments of said office, as aforesaid.

Affiant alleges that the said legislation, in so far as it attempts to deprive this affiant of his rights in said office and to authorize the selection or appointment of any other person to be Assessor of Bernalillo County for the unexpired term for which this affiant
 61 was elected, is void because it is in contravention of the provisions of the Constitution of the United States and of the legislation of Congress, and affiant prays that there may be a judicial inquiry as to the title of this affiant and of the said George F. Albright to the said office of Assessor of Bernalillo County.

JESUS M. SANDOVAL.

Subscribed and sworn to before me by Jesus Ma. Sandoval this 20th day of July, 1903.

[NOTARIAL SEAL.]

FRANK ACKERMAN.

Notary Public, Bernalillo County.

Endorsed: "Filed in my office this July 20th, 1903. W. E. Dame, Clerk."

And thereafter, on to-wit, the 20th day of July, 1903, there was entered of record in the office of the Clerk of said Court, in said cause, an order, which said order is in words and figures following, to-wit:

On reading and filing the affidavit of Jesus Maria Sandoval, and the motion of the Solicitor General founded thereon, it is ordered that George F. Albright show cause before this Court on Tuesday,

the 21st day of July, 1903, at 10 o'clock A. M., why the said Solicitor General shall not have leave to file an information in the nature of quo warranto against him for usurping the office of Assessor of Bernalillo County.

Service of a copy of this order be made on George F. Albright during this 20th day of July, 1903, by any disinterested person.

B. S. BAKER, *Judge*.

62 I, George F. Albright, hereby acknowledge service this 20th day of July, 1903.

GEO. F. ALBRIGHT.

Endorsed: "Filed in my office this July 20th, 1903. W. E. Damm, Clerk."

And thereafter, on to-wit, the 21st day of July, 1903, there was entered of record in the office of the Clerk of said Court, in said cause, an order granting leave to file information, etc., which said order is in words and figures following, to-wit:

THE TERRITORY OF NEW MEXICO on the Relation of JESUS MARIA SANDOVAL

vs.

GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the motion of the Solicitor General, to show cause, the Court, upon consideration, grants the same and leave is hereby given to file an information in the nature of a quo warranto.

It is ordered by the Court that the defendant, George F. Albright, be and he hereby is ordered to make answer on Thursday, at 9:30 A. M., July 23rd, 1903.

The defendant being present in court in person, and by counsel, waives service of copy of information.

63 And thereafter, on to-wit, the 21st day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, an Information, which said Information is in words and figures following, to-wit:

Territory of New Mexico, Bernalillo County District Court.
March Term, A. D. 1903.

THE TERRITORY OF NEW MEXICO on the Relation of JESUS MA. SANDOVAL

vs.

GEORGE F. ALBRIGHT.

Information.

Edward L. Bartlett, Solicitor General for the Territory of New Mexico, who prosecutes for and on behalf of the people of the Terri-

tory of New Mexico on the relation of Jesus Ma. Sandoval, of the County of Bernalillo aforesaid, comes here in the Court and gives the Court to understand and be informed, that at the general election held in the Territory of New Mexico on the 4th day of November, 1902, Jesus Ma. Sandoval was duly elected to the office of Assessor of the County of Bernalillo aforesaid, and received from the proper officers of said County a certificate of his election to the said office; that thereafter and within the time prescribed by law the said Jesus Ma. Sandoval duly qualified and entered upon the discharge of the duties of the said office of Assessor aforesaid, and has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office; that the said Jesus Ma. Sandoval has never resigned from nor vacated his said office, nor has the

64 term for which he was elected expired, nor has the said office become vacant, nor has it been without a lawful incumbent at any time since the said Jesus Ma. Sandoval qualified and entered upon the discharge of the duties of said office. Nevertheless one George F. Albright on the 23rd day of March, 1903, and while the said Jesus Ma. Sandoval was in possession of said office and engaged in the discharge of the duties thereof, by stealth and fraud and without authority of law did unlawfully usurp the said office of Assessor of Bernalillo County and did take possession of the room assigned for the use of the Assessor of Bernalillo County in the Court House of said County, and of the books, papers and other insignia of said office, and has ever since assumed to be Assessor of Bernalillo County aforesaid, and by such unlawful usurpation and intrusion has become possessed of the said office of Assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Territory of New Mexico.

II.

And the said Solicitor General on the relation of said Jesus Ma. Sandoval, further gives the Court here to understand and be informed that on the 23rd day of March, 1903, George F. Albright unlawfully took possession of and held and still does unlawfully hold the office of Assessor of Bernalillo County, and claims to hold the same and to be the lawful incumbent of said office by virtue of a pretended appointment thereto by the Board of County Commissioners of Bernalillo County which was pretended to be made by authority of an act of the Legislative Assembly of the Territory of

65 New Mexico, entitled, "An Act to Create the County of Sandoval," approved March 10th, 1903, as amended by an act, entitled, "An Act to Amend Section 3 of an Act entitled, 'An Act to Create the County of Sandoval,'" approved March 12th, 1903.

Which said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person than the said Jesus Ma. Sandoval to be Assessor of the County of Bernalillo aforesaid for the term for which the said Jesus Ma. Sandoval had been theretofore elected by the qualified electors of Bernalillo County as in the first

count thereof set forth, in that the said legislation attempts to deprive the said Jesus Ma. Sandoval of his right to said office for the full term for which he was elected without due process of law and deprives the said Jesus Ma. Sandoval of the equal protection of the laws and is therefore in contravention of the provisions of the Constitution of the United States, and in that the said legislation is a special law regulating County affairs and granting special privileges to the Board of County Commissioners of Bernalillo County and is in contravention of the legislation of Congress and is not within the grant of legislative power granted by Congress to the Territorial Legislature, in that the same is not, so far as it attempts to deprive the said Jesus Ma. Sandoval of the office of Assessor of Bernalillo County for a portion of the term for which he was elected, a rightful subject of legislation by the said Territorial Legislature, and the said George F. Albright therefore holds the said office and assumes to discharge the duties thereof wrongfully contrary to the form of the statute in such cases made and provided and against the peace
66 and dignity of the Territory of New Mexico.

EDWARD L. BARTLETT,
Solicitor General for the Territory of New Mexico.

Endorsed, "Filed in my office this July 21st, 1903. W. E. Daine, Clerk."

And thereafter, on to-wit, the 23rd day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, a Demurrer to the Information, which said Demurrer was in words and figures following, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

THE TERRITORY OF NEW MEXICO ex Rel. JESUS MA. SANDOVAL

vs.

GEORGE F. ALBRIGHT.

Demurrer.

Now comes the respondent, George F. Albright, by W. B. Childers, his attorney, and demurs to the information filed in the above entitled cause, and for ground of demurrer alleges:

1. That the said information does not state facts sufficient in law on which to base the writ issued in said cause.

2. Because it affirmatively appears in and by said information that the respondent holds said office of Assessor of the County of Bernalillo under and by virtue of an appointment by the Board of County Commissioners of Bernalillo County, made under and by virtue of the authority in them vested by section 3 of an act entitled, "An Act to Amend Section 3 of an Act entitled, 'An Act to Create the County of Sandoval,' approved March 10, 1903," approved March 12, 1903, of the Thirty-fifth Legislative Assembly of the Territory of New Mexico.

3. Because the relator has no vested right, title and interest and had no right, title and interest in and to said office of Assessor, and the said office was under the power and control of the Legislative Assembly of the Territory of New Mexico.

4. Because in appointing the respondent Assessor of the County of Bernalillo the Board of County Commissioners acted in due conformity and in all respects with law and under and by virtue of the act of the Legislative Assembly, set up in said information and above set forth.

5. Because the said act is not in contravention of the provisions of the Constitution of the United States, and is valid and constitutional in all respects.

6. Because the said information does not state facts sufficient to entitle the relator to the relief prayed for.

Wherefore, respondent prays that the said information may be dismissed and the said writ quashed.

W. B. CHILDERS,

Attorney for Respondent.

Endorsed: "Filed in my office this July 23rd, 1903. W. E. Dame, Clerk."

68 And thereafter, on to-wit, the 23rd day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, the Answer of Respondent, which said answer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO.

County of Bernalillo:

In the District Court.

TERRITORY ex Rel. JESUS MARIA SANDOVAL, Relator,

vs.

GEORGE F. ALBRIGHT, Respondent.

Answer.

Now comes George F. Albright, respondent in the above entitled cause, and for answer to the information filed against him, says:

1. That he admits that at the general election held in the Territory of New Mexico on the fourth day of November, A. D. 1902, Jesus Maria Sandoval was duly elected to the office of Assessor of the County of Bernalillo and received from the proper officers of said County a certificate of his election to said office; that thereafter and within the time prescribed by law, the said Jesus Maria Sandoval duly qualified and entered upon the discharge of the duties of said office of Assessor as aforesaid; but respondent denies that the said Jesus Maria Sandoval has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office and denies that the said Jesus Maria Sandoval is at the present

time so qualified or has been so qualified since the tenth day of March, A. D. 1903.

69 2. Further answering, the respondent says that he has no information as to whether or not the said Jesus Maria Sandoval has resigned his said office, but he denies that the said office did not become vacant and was not vacated by the said Jesus Maria Sandoval. Respondent admits that the term for which the said Jesus Maria Sandoval was elected has not expired; that is to say, this respondent alleges that the said Jesus Maria Sandoval was elected to fill the office of Assessor of the County of Bernalillo for the term beginning the first day of January, A. D. 1903, and the said term being for two years from that date, but this respondent alleges that the said office became vacant on the tenth day of March, A. D. 1903, in the manner hereinafter alleged.

3. This respondent further answering alleges that on the 23rd day of March, 1903, this respondent was lawfully appointed to said office as hereinafter alleged, and further alleges that the said office was vacant at the time he was so lawfully appointed, and denies that the said Jesus Maria Sandoval was in possession of the said office, engaged in the discharge of the duties thereof, and further answering, denies that by stealth and fraud and without authority of law did unlawfully usurp the said office and did unlawfully take possession of the room assigned for the use of the Assessor of Bernalillo County, in the court house of said county, and the books, papers and other insignia of said office. Respondent alleges that after having been duly appointed and qualified as Assessor by filing his bond and oath of office as required by law, on the day aforesaid, he demanded possession of the office and said books and papers from one Jesus Garcia, who was then in possession of the same, 70 and the said Jesus Garcia, who had formerly been a deputy under the said Jesus Maria Sandoval, peacefully delivered possession of the said room and said books, papers and other insignia of the office to this respondent.

4. Further answering, this respondent admits that he has ever since assumed to be the Assessor of Bernalillo County and alleges he is the lawful Assessor of said county, and denies that by any unlawful usurpation and intrusion he has become possessed of the said office of Assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico, as alleged in said information, and alleges that he is the lawful incumbent thereof and entitled to the emoluments, immunities and privileges appertaining and belonging to the same.

5. For answer to the second cause of action in said information alleged, this respondent says that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed Assessor of the County of Bernalillo, and duly qualified as such aforesaid by filing his bond and oath of office, by the Board of County Commissioners of Bernalillo County, acting under and by virtue of Section 3 of an act of the Legislative Assembly of the Territory of New Mexico,

entitled, "An Act to Create the County of Sandoval, approved March 10, 1903," and as amended by an act entitled, "An Act to Amend Section 3 of an Act entitled, 'An Act to Create the County of Sandoval,' approved March 12th, 1903;" and this respondent, further answering, denies that the said legislation was and is void in law and

71 of no effect in so far as it attempted or pretended to authorize or empower the selection or apportionment of any other person other than the said Jesus Maria Sandoval to be Assessor of the County of Bernalillo aforesaid for the unexpired part of the term for which the said Jesus Maria Sandoval had been theretofore elected by the qualified electors of Bernalillo County, as in the first count of said information set forth; and denies that the said act in said particulars is void in law because the said legislation attempts to deprive the said Jesus Maria Sandoval of his right to said office for the full term for which he was elected, without due process of law, and to deprive the said Jesus Maria Sandoval of the equal protection of law, and is therefore in controvention of the provisions of the Constitution of the United States, and in that the said legislation is a special law regulating county affairs and granting special privileges to the Board of County Commissioners of Bernalillo County and is in controvention of the legislation of Congress and not within the grant of legislative power granted by Congress to the Territorial Legislature, in that the same is not in so far as it attempts to deprive the said Jesus Maria Sandoval of the office of Assessor of Bernalillo County for a portion of the term for which he was elected a rightful subject of legislation by said Territorial Legislature, but respondent alleges that the said legislation is valid in every particular and fully authorized and empowered the County Commissioners to appoint this respondent to said office.

6. Further answering, this respondent alleges that the office of Assessor of the County of Bernalillo became and was vacant by reason of said legislation and creation of the County of Sandoval, it having been previously a part of the County of Bernalillo;

72 said legislation being for the purpose of dividing the County of Bernalillo, and creating the County of Sandoval; that the Legislature had full power and authority to pass said acts and every part thereof, and thereby vest in the County Commissioners of Bernalillo County the power to appoint this respondent, or such other person as they saw fit to select, to the office of Assessor for the new County of Bernalillo, as the same existed from and after the date of the passage of said acts. Respondent further alleges that the office was subject to the control of the Legislature and that a vacancy thereafter was created by said acts above referred to.

7. Further answering, this respondent alleges that by virtue of an act entitled, "An Act to Create the County of Sandoval," approved March 10, 1903, there was created the County of Sandoval, in the Territory of New Mexico, and that the said relator at the time of the creation of said County of Sandoval was and had been for a long time and many years previous thereto, a resident of the portion of Bernalillo County which was incorporated into and made the County of Sandoval, and that by virtue of the passage of said

act creating the County of Sandoval, the said relator became and was and still is a resident of the said County of Sandoval and not of the County of Bernalillo, and thereupon the said relator ceased to be upon the passage of said act a resident of the said County of Bernalillo, and was disqualified from exercising the duties of the office of Assessor of the said County of Bernalillo to which he had theretofore been elected, and at the time of the appointment and qualification of this respondent as such Assessor, by virtue of his appointment by the Board of County Commissioners under and by virtue of the act of the Legislative Assembly of the Territory of New Mexico, entitled, "An Act to Amend an Act Entitled, 'An Act to Create the County of Sandoval,' approved March 10, 1903, approved March 12, 1903," as alleged in the information in this cause, such office was and had been since the date of the creation of the said County of Sandoval, vacant; and the said respondent denies that he holds the said office and assumes to discharge the duties thereof wrongfully and contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico.

W. B. CHILDERS,

Attorney for Respondent.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

George F. Albright, being duly sworn, on oath deposes and says that he is the respondent in the above entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained are true.

GEO. F. ALBRIGHT,

Subscribed and sworn to before me this 24th day of July, A. D. 1903.

[NOTARIAL SEAL.]

E. L. MEDLER,

Notary Public.

Endorsed: "Filed in my office this July 23rd, 1903. W. E. Dame, Clerk."

And thereafter, on to-wit, the 24th day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, a Demurrer to the Answer of Respondent, which said Demurrer is in words and figures following, to-wit:

Territory of New Mexico, Bernalillo District Court.

TERRITORY ex Rel. JESUS M. SANDOVAL

VS.

GEORGE F. ALBRIGHT.

Comes now the Solicitor General and says that the said answer of the said respondent is not sufficient in law to establish the title of said respondent to the office of Assessor of Bernalillo County, and

shows to the Court the following causes of demurrer to the said answer, to-wit:

1. Because the division of the Territory of the County of Bernalillo did not take place under the acts of the Legislature relied on, and said act did not become operative as to such division until April 14th, 1903.

2. Because on the 23rd day of March, 1903, the relator was a resident of the County of Bernalillo and the County of Sandoval had no Territorial existence until April 14th, 1903.

3. Because the Legislature could not create a vacancy in the relator's office because of his non-residence of the County of Bernalillo, when he was both as a matter of law and fact a resident of the County of Bernalillo, as appears by the allegations of said answer certainly until April 14, 1903.

4. Because the allegations of said answer affirmatively show that the relator and not the respondent is entitled to said office.

75 5. Because the respondent, George F. Albright, was and is ineligible to the said office if it is a new office, as alleged in said answer, as this Court will take judicial notice of the fact that he is a member of the Legislative Council which passed said acts, and as such is incompetent to hold any office created by said Council.

6. Because the said answer does not state facts showing that respondent is entitled to said office, and is otherwise insufficient to constitute a defense to this action.

Wherefore, etc.

E. L. BARTLETT,

Solicitor General.

Endorsed: "Filed in my office this July 24th, 1903. W. E. Dame, Clerk."

And thereafter, on to-wit, the 24th day of July, 1903, there was entered of record in the office of the Clerk of said Court, in said cause, an order granting leave to strike out certain parts of answer, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO ex Rel. JESUS MARIA SANDOVAL

vs.

GEORGE F. ALBRIGHT.

On motion, the defendant is hereby given leave to strike from his answer the following words, "In effect a new office," to which the plaintiff duly excepts.

76 Thereupon the cause came on for hearing by the Court, and upon the completion of argument by counsel, the Court takes the matter under advisement.

And thereafter, on to-wit, the 3rd day of August, 1903, there was entered of record in the office of the Clerk of said Court, in said cause, an order overruling the demurrer to answer, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO ex Rel. JESUS M. SANDOVAL
vs.

GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the information, and the Answer of the Respondent and the Demurrer filed thereto, the Court having heard counsel for the respective parties, Neill B. Field appearing for the Territory and W. B. Childers appearing for the Respondent, and being fully advised in the premises, the said demurrer is overruled; and whereupon the Territory and the Relator announce that they will not plead further, it is ordered by the Court, the demurrer admitting the truth of the allegations contained in the answer, and that the Territory and Relator take nothing by their Writ, and that the said Respondent be and he is entitled to hold the office of Assessor of Bernalillo County, and that the said Writ be dismissed and that the Respondent have and recover his costs in this behalf expended, to be taxed, and that execution issue therefor.

Endorsed: "Filed in my office this August 3d, 1903. W. E. Dame, Clerk."

77 And thereafter, on to-wit, the 19th day of October, 1904, there was filed in the office of the Clerk of the District Court a Mandate from the Supreme Court of the Territory of New Mexico, which said Mandate is in words and figures as follows:

TERRITORY OF NEW MEXICO:

To the District Court, Sitting Within and for the County of Bernalillo, in the Second Judicial District, Greeting:

Whereas, In a certain cause lately pending before you, wherein the Territory of New Mexico ex rel. Jesus Ma. Sandoval was plaintiff, and George F. Albright was defendant, by your consideration in that behalf, judgment was entered against the said plaintiff; and,

Whereas, The said cause and judgment were afterwards brought into our Supreme Court for review by appeal, whereupon such proceedings were had in said Supreme Court that at the January, 1904, term thereof, on the twenty-fourth day of said term, the same being September 13th, 1904, it was considered that the judgment aforesaid, by you in form given, be reversed, and that the said cause be remanded to you with directions to re-instate this cause and proceed in accordance with the views expressed in the opinion of the Court on file.

Now, therefore, you are hereby commanded to reinstate said cause upon your docket and proceed in accordance with the views expressed in the opinion of the Court on file.

78 Witness, the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the seal of said Court, this 17th day of October, 1904.

JOSE D. SENA, Clerk.

Endorsed: "Filed in my office this October 19, 1904. W. E. Dame, Clerk."

And thereafter, on to-wit, the 25th day of October, there was entered of record in said cause an order reinstating the same upon the docket of the Second Judicial District Court for Bernalillo County, which said order is in words and figures as follows, to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6395.

TERRITORY OF NEW MEXICO ex Rel. JESUS M. SANDOVAL

vs.

GEORGE F. ALBRIGHT.

Now, on this 24th day of October, 1904, this cause came on to be heard; N. B. Field appearing for Jesus Maria Sandoval, the relator; E. L. Medler for the respondent, George F. Albright. The relator moved the Court to enter final judgment of ouster in said cause and for costs against the respondent; which motion was overruled. Relator excepts.

79 Thereupon the Court ordered that this cause be reinstated on the docket and that the judgment hereinbefore entered in favor of the respondent Albright be, and the same is hereby vacated, set aside, and held for naught.

It is further ordered that the demurrer of the relator to the answer of the respondent is hereby sustained; to which the respondent excepts. Respondent Albright given leave to file an amended answer on or before the 5th day of November, 1904.

(Signed)

B. S. BAKER, *Judge*.

And thereafter, on to-wit, the 5th day of November, 1904, there was filed in the office of the Clerk of said Court an Amended Answer; which said Amended Answer is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,

County of Bernalillo:

In the District Court.

TERRITORY ex Rel. JESUS MARIA SANDOVAL, Relator,

vs.

GEORGE F. ALBRIGHT, Respondent.

Amended Answer.

Now comes George F. Albright, respondent in the above entitled cause, and by leave of the Court, files herein his Amended Answer to the Information filed against him, and says:

1. That he admits that at the general election held in the Terri

80 tory of New Mexico the fourth day of November, A. D. 1902, Jesus Maria Sandoval was duly elected to the office of assessor of the County of Bernalillo and received from the proper officers of said county a certificate of his election to said office; that thereafter and within the time prescribed by law, the said Jesus Maria Sandoval duly qualified and entered upon the discharge of the duties of said office as assessor as aforesaid; but respondent denies that the said Jesus Maria Sandoval has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office and denies that the said Jesus Maria Sandoval is at the present time so qualified or has been so qualified since the tenth day of March, A. D. 1903.

2. Further answering, the respondent says that he has no information as to whether or not the said Jesus Maria Sandoval has resigned his said office, but he denies that the said office did not become vacant and was not vacated by the said Jesus Maria Sandoval. Respondent admits that the term for which the said Jesus Maria Sandoval was elected has not expired, that is to say, this respondent alleges that the said Jesus Maria Sandoval was elected to fill the office of assessor of the County of Bernalillo for the term beginning the first day of January, A. D. 1903, and the said term being for two years from said date; but this respondent alleges that the said office became vacant on the tenth day of March, A. D. 1903, in the manner hereinafter alleged.

3. This respondent further answering, alleges that on the 23rd day of March, 1903, this respondent was lawfully appointed to said office as hereinafter alleged, and further alleges that the said office was vacant at the time he was so lawfully appointed, and denies that the said Jesus Maria Sandoval was in possession of the said office, engaged in the discharge of the duties thereof, and further
81 answering, denies that by stealth and fraud and without authority of law did unlawfully usurp the said office and did unlawfully take possession of the room assigned for the use of the assessor of Bernalillo County, in the court house of said County, and the books, papers and other insignia of said office. Respondent alleges that after having been duly appointed and qualified as assessor by filing his bond and oath of office as required by law, on the day aforesaid, he demanded possession of the office and said books and papers from one Jesus Garcia who was then the only person in actual possession of the same, he, the said Jesus Garcia, having been a deputy under the said Jesus Maria Sandoval and being then and there his representative in possession of the said office, books and papers, and that he, the said Jesus Garcia, so representing the said Jesus Maria Sandoval, peacefully surrendered possession of the said room and said books, papers and other insignia of office to this defendant without objection; and that at the time that he demanded the possession of the said office, books and papers from the said Garcia, he presented to him an order from the County Commissioners of the said County of Bernalillo, directed to the said Jesus Maria Sandoval, commanding him, the said Sandoval, to deliver the said office, books and papers and insignia of office to this respondent.

4. Further answering, this respondent admits that he has ever since assumed to be the assessor of Bernalillo County, and alleges that he is the lawful assessor of said County, and denies that by any unlawful usurpation and intrusion he has become possessed of the said office of assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico, as alleged in said information, and alleges that he is the lawful incumbent thereof and entitled to the emoluments, immunities and privileges appertaining and belonging to the same.

5. For answer to the second cause of action in said information alleged, this respondent says that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed assessor of the County of Bernalillo, and duly qualified as such as aforesaid by filing his bond and oath of office, by the Board of County Commissioners of Bernalillo County, acting under and by virtue of Section 3 of an act of the Legislative Assembly of the Territory of New Mexico, entitled, "An Act to create the County of Sandoval, approved March 10, 1903," and as amended by an act entitled, "An Act to amend Section 3 of an Act entitled, 'An Act to create the County of Sandoval,' " approved March 12, 1903; and this respondent, further answering, denies that the said legislation was and is void in law and of no effect in so far as it attempted to pretend to authorize or empower the selection or appointment of any other person than the said Jesus Maria Sandoval to be assessor of the County of Bernalillo aforesaid for the unexpired part of the term for which the said Jesus Maria Sandoval had been therefor elected by the qualified electors of Bernalillo County, as in the first count of said information set forth; and denies that the said act in said particulars is void in law because the said legislation attempts to deprive the said Jesus Maria Sandoval of his right to said office for the full term for which he was elected without due process of law and to deprive the said

Jesus Maria Sandoval of the equal protection of law, and is therefore in contravention of the provisions of the Constitution of the United States and in that the said legislation is a special law regulating County affairs and granting special privileges to the Board of County Commissioners of Bernalillo County and is in contravention of the legislation of Congress and not within the grant of legislative power granted by Congress to the Territorial Legislature, in that the same is not, in so far as it attempts to deprive the said Jesus Maria Sandoval of the office of assessor of Bernalillo County for a portion of the term for which he was elected, a rightful subject of legislation by said Territorial Legislature, but respondent alleges that the said legislation is valid in every particular and fully authorized and empowered the County Commissioners to appoint this respondent to said office.

6. Further answering, this respondent alleges that the office of assessor of the County of Bernalillo became and was vacant by reason of said legislation and creation of the County of Sandoval, it having been previously a part of the County of Bernalillo; said legislation

being for the purpose of dividing the County of Bernalillo and creating the County of Sandoval; that the Legislative Assembly, together with the Governor of the said Territory, had full power and authority to pass said acts and every part thereof, and thereby vest in the County Commissioners of Bernalillo County the power to appoint this respondent, or such other person as they saw fit to select, to the office of assessor for the new County of Bernalillo, as the same existed from and after the date of the passage of said acts. Respondent further alleges that the office was subject to the control of the

84 Legislative Assembly and the Governor of the Territory of New Mexico, legislating under the provisions of the Organic Act, and that a vacancy thereby was created by said acts above referred to.

7. Further answering, as to both of the said causes of action set up in the said information, this respondent alleges that by virtue of said act entitled, "An Act to create the County of Sandoval, approved March 10, 1903," and the act to amend the said act, approved March 12, 1903, there was created the County of Sandoval, in the Territory of New Mexico, and that the said relator at the time of the creation of the said County of Sandoval by said acts, was and had been for a long time and many years previous thereto a resident of the portion of Bernalillo County which was incorporated into and made the County of Sandoval, and that by virtue of the passage of the said acts the said relator became and was, and still is, a resident of the said County of Sandoval and not of the County of Bernalillo. Thereupon the said relator ceased to be upon the passage of said acts a resident of the County of Bernalillo as constituted after the passage of the same, and was disqualified from exercising the duties of the office of assessor of the said County of Bernalillo as so constituted, and at the time of the appointment and qualification of this respondent as such assessor by the Board of County Commissioners of the said County of Bernalillo as newly constituted under the said acts of the Legislative Assembly, as alleged in said information, the said relator was a resident, as aforesaid, of that portion of the original County of Bernalillo which became and was a part of the newly created County of Sandoval, and continued to be such a resident, and still continues to be such a resident, and had not removed

85 into that portion of the original County of Bernalillo which constituted the new County of Bernalillo after the passage of the said acts, and now constitutes the same. Respondent further alleges that the relator always had been a resident of the territory now constituting the said County of Sandoval, prior to the passage of the said acts as aforesaid, and has ever since been a resident of the same, and had not removed into the territory constituting the County of Bernalillo after the passage of the said acts and now constituting the same, nor has he removed into the same up to this time. And respondent alleges that the office of assessor of the said County of Bernalillo as constituted by the passage of the said acts, became vacant, and would have become vacant by reason of the facts hereinbefore last above alleged, even if the said acts had not declared the said office vacant and respondent denies that the said relator is entitled or

qualified to hold the office of assessor of the said County of Bernalillo as newly constituted, and can have any judgment in this cause entitling him to the possession of the said office; and the said respondent denies that he holds the said office and assumes to discharge the duties thereof wrongfully and contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico.

W. B. CHILDERS,
Attorney for Respondent.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

George F. Albright, being duly sworn, on oath deposes and says
86 that he is the respondent in the above entitled cause; that he
has read the foregoing amended answer and knows the content thereof, and that the matters and things contained therein are true.

GEORGE F. ALBRIGHT.

Subscribed and sworn to before me this 4th day of November,
A. D. 1904.

[SEAL.]

E. L. MEDLER,
Notary Public.

And thereafter, on the 7th day of November, there was filed in the office of the Clerk of the said Court by the relator, a motion for judgment on the pleadings, which said motion is in words and figures as follows, to-wit:

Territory of New Mexico, Bernalillo District Court.

No. 6395.

TERRITORY OF NEW MEXICO ex Rel. JESUS M. SANDOVAL, Relator,
vs.
GEORGE F. ALBRIGHT, Respondent.

Motion for Judgment on the Pleadings.

Comes now the relator, by his attorney, and moves the Court for judgment on the pleadings in this cause, and for cause of said motion shows to the Court the following, that is to say:

1. Because the amended answer filed herein by the re-
87 spondent is frivolous and contains no material allegation
not contained in the original answer.

2. Because the defense attempted to be set up in the said amended answer is res judicata, and the said respondent seeks, by the said amendment, to obtain a reconsideration in this Court of matters which have already been adjudicated adversely to the respondent by the Supreme Court of this Territory in this cause.

3. Because it affirmatively appears from the allegations of the said amended answer that the relator is entitled to the said office of assessors of Bernalillo County, and that the respondent has no lawful right thereto.

4. Because the said amended answer does not state facts showing that respondent is entitled to hold the office of assessor of Bernalillo County, and is otherwise insufficient in law to constitute a defense to this action.

Wherefore relator prays the Court to enter a judgment of ouster against the respondent and for costs notwithstanding the said answer.

NEILL B. FIELD,
Attorney for Relator.

Endorsed: "Filed in my office this Nov. 7, 1904. W. E. Dame, Clerk."

And thereafter, on to-wit, the 19th day of November, 1904, there was entered in record in said cause objections of the respondent to the entry of certain parts of the judgment proposed to be rendered in said cause, which said objections are in words and figures as follows, to-wit:

88 Territory of New Mexico, County of Bernalillo, in the District Court.

TERRITORY ex Rel. JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT, Respondent.

To so much of the judgment in said cause as is proposed to be rendered and as is rendered, as reads as follows:

"That the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of Assessor of the County of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of Assessor of the County of Bernalillo and Territory of New Mexico as the lawful custodian thereof."

Counsel for respondent objects, upon the ground that it is not a proper part of a judgment to be rendered in said cause, and is not supported by the pleadings or the mandate of the Supreme Court, or the action of the Court in sustaining the motion treated as a demurrer in said cause to the amended answer of the respondent filed therein. Which objection the Court overrules, and to its action in overruling the same the respondent by his counsel excepts.

And thereupon, upon the said 19th day of November, 1904, there was entered of record in said cause a Final Judgment which

89 said Judgment is in the words and figures as follows to-wit:

Territory of New Mexico, County of Bernalillo, in the District Court.

TERRITORY OF NEW MEXICO ex Rel. JESUS MARIA SANDOVAL,
Relator,

VS.

GEORGE F. ALBRIGHT, Respondent.

This day this cause coming on to be heard, upon the motion of the relator for judgment upon the pleadings, and the Court having read the same, and being fully advised in the premises, said motion is by the Court sustained, as to the third and fourth paragraphs thereof.

Wherefore it is considered, ordered, adjudged and decreed by the Court that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of Assessor of the County of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of Assessor of the County of Bernalillo, aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of Assessor of the County of Bernalillo and Territory of New Mexico, as the lawful custodian thereof.

90 It is further considered, ordered, adjudged and decreed by the Court that the relator, Jesus Maria Sandoval, do have and recover of and from the respondent, George F. Albright, his costs in this behalf expended, to be taxed, and may have execution therefor.

To the rendition of the foregoing judgment the respondent hereby excepts and prays the Court to grant him an appeal and to fix the amount of a bond for supersedeas and to grant him a supersedeas upon filing proper bond in accordance with the amount so fixed, to be approved by the Court; which prayer for an appeal and for the fixing and acceptance of a supersedeas bond the Court denies; and to which action of the Court denying the same the respondent, by his counsel, excepts.

B. S. BAKER, *Judge*.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

I, W. E. Dame, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in obedience to the Writ of Error hereinbefore set forth, do hereby certify unto the Supreme Court of the Territory of New Mexico the above and foregoing as a true, correct and complete transcript and copy of so much of the record and proceedings had in the cause lately pending in said Court for the County of Bernalillo, wherein the Territory of New Mexico et al., were plaintiffs,

and George F. Albright was defendant, as same appears of record in my office, and as I was by said Write commanded to do.

In witness whereof I have hereunto set my hand and affixed the seal of said Court on this 17th day of December, 1904.

[SEAL.]

W. E. DAME, *Clerk*.

TERRITORY OF NEW MEXICO.

County of Bernalillo:

I hereby certify the above and foregoing to be a full, true and correct transcript of all the testimony and rulings of the Court taken down by the undersigned Court Stenographer at the trial of the foregoing entitled cause, together with the exhibits introduced thereat.

Witness my hand this November 30, 1906.

HARRY C. OWEN,

Official Stenographer, District Court Bernalillo County, N. M.

Territory of New Mexico, County of Bernalillo, in the District Court.

No. 6710.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

Forasmuch as defendant has prayed that the foregoing matters and things be made a part of the Bill of Exceptions in this cause in order that they may become a part of the record herein, said Bill of Exceptions containing all the evidence, with the objections, rulings, exceptions and other proceedings had in the course of

the trial of said cause, the same is hereby allowed, and signed, sealed, enrolled and made a part of the record in said cause, this the 14th day of December, A. D. 1906.

[SEAL.]

IRA A. ABBOTT,

Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Second Judicial District Court Thereof.

Endorsed: "Filed in my office this Dec. 14, 1906. John Venable, Clerk."

TERRITORY OF NEW MEXICO.

County of Bernalillo, ss:

I, John Venable, Clerk of the District Court of the Second Judicial District, Territory of New Mexico, within and for the County of Bernalillo, hereby certify the following to be a true, correct and complete transcript of the following:

The Complaint;

Defendant's Demurrer to the Complaint;

Order Overruling Defendant's Demurrer to the Complaint;

Defendant's Amended Answer to the Complaint;

Plaintiff's Demurrer to Defendant's Amended Answer;

Plaintiff's Reply to Amended Answer of Defendant;

Order sustaining in part and overruling in part the Demurrer of Plaintiff to Defendant's Amended Answer; entry of trial of cause by jury and verdict of the jury;

Plaintiff's Motion for a New Trial;

93 Defendant's Motion for a New Trial;

Order overruling motions for new trial; judgment and order granting appeal to the Supreme Court;

Supersedeas Bond;

Bill of Exceptions;

in a cause lately pending in said Court, wherein Jesus M. Sandoval was plaintiff and George F. Albright was defendant, as same remain of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this 17th day of December, A. D. 1906.

[SEAL.]

JOHN VENABLE, *Clerk*.

94 And afterwards, on to wit, *on* the nineteenth day of February, A. D. 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors by appellant, which said assignment of errors were and are in words as follows to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1190.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellee.

Appeal from District Court, Bernalillo County.

Assignment of Errors.

Now comes the appellant in the above entitled cause and assigns as error the following:

1. The court erred in overruling the demurrer of the defendant to the complaint filed in said cause, upon the several grounds mentioned in said demurrer.

2. The court erred in holding that the appellant and defendant was responsible to the appellee and plaintiff for any moneys received as the incumbent of said office.

3. The court erred in holding that the said complaint stated facts sufficient to constitute a cause of action against the appellant.

4. The court erred in holding that the plaintiff was qualified to hold said office, and was therefore entitled to receive the fees and emoluments thereof.

5. The court erred in holding that the appellant was not the lawful incumbent of said office.

6. The court erred in holding that the said office was not vacant by reason of the legislation referred to in paragraphs 7 and 8 of the amended answer to said complaint.

95 7. The court erred in sustaining plaintiff's demurrer, as to the 1st, 2nd, 3rd, 4th and 5th grounds of said demurrer, to defendant's amended answer.

8. The court erred in directing a verdict in favor of the plaintiff for the sum of \$5360.53.

9. The court erred in directing any verdict whatever in favor of the plaintiff.

10. The court erred in overruling defendant's motion for a new trial.

11. The court erred in excluding from evidence the proceedings of the Board of County Commissioners under date of March 23, 1903, offered in connection with the evidence of the witness Arthur E. Walker, and also including the bond and oath of office of the defendant.

12. The court erred in excluding the question as to what precinct of Sandoval County the plaintiff lived in when he was elected to office, and as to whether he ever voted outside of said precinct.

W. B. CHILDERS,

Attorney for Appellant.

Which said assignment of error was and is endorsed as follows to wit: No. 1190—Supreme Court, Territory of New Mexico—Jesus M. Sandoval appellee, vs. Geo. F. Albright, appellant,—Assignment of errors,—Filed in my office this Feb. 19, 1907, Jose D. Sena, Clerk.—W. B. Childers, Attorney for appellant.

And afterwards, on to wit, on the 19th day of February, A. D. 1907, there was filed an assignment of errors on cross-appeal, in the above entitled cause, which said assignment of errors on cross-appeal were and are in words and figures following to wit:

96 In the Supreme Court of the Territory of New Mexico,
January Term, A. D. 1907.

No. 1190.

JESUS MA. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Assignment of Errors on Cross-appeal.

Comes now the said Jesus Ma. Sandoval, by his attorney, and shows to the court here that in the record, proceedings and judgment of the District court of Bernalillo County, in the above entitled

cause, there is manifest error to the prejudice of the said Jesus M. Sandoval, in this to wit:

1. The court erred in overruling the sixth, seventh and eighth grounds of the demurrer to the amended answer.

2. The court erred in refusing to direct a verdict in favor of the plaintiff for the sum of six thousand six hundred and forty dollars and eighty cents (\$6,648.80) with interest.

3. The court erred in allowing defendant credit for the sum of two thousand one hundred and forty two dollars and twenty five cents (\$2,142.25).

Wherefore, the said Jesus M. Sandoval prays that the said errors complained of may be seen and examined by this honorable court, and that the judgment of the said court in that behalf may be reversed, and that the said Jesus M. Sandoval may be restored to all things that he has lost by reason of the said errors.

NEILL B. FIELD,

Attorney for Jesus M. Sandoval.

Which said assignment of errors was and is in words following to wit: No. 1190—George F. Albright, appellant, vs. Jesus M. Sandoval, appellee—Assignment of errors on cross-appeal.—Filed in my office this Feb. 19, 1907, Jose D. Sena, Clerk.

97 And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D., 1907, on the eleventh day thereof, the same being the 26th day of February, A. D., 1907, the following among other proceedings were had and entered of record, following to wit:

No. 1190.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on for hearing, upon the transcript of record, assignment of errors, and briefs of counsel, is argued by W. B. Childers, Esq. for appellant, and Neill B. Field, Esq. for appellee, and submitted to the court, and the court not being sufficiently advised in the premises, take the same under advisement.

And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, the same being January 8th, 1908, on the fourth day of the said regular term, the same being Monday the 13th day of January, A. D., 1908, the following among other proceedings were had and entered of record, following to wit:

No. 1190.

JESUS M. SANDOVAL, Appellee,
vs.
GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice McFie, Chief Justice Mills, and Associate Justices Mann, Parker and Pope, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the Court in and for the County of Bernalillo, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, It is considered and adjudged by the court that the appellee herein do have and recover of and from the appellant Geo. F. Albright, the sum of Five Thousand seven hundred and sixty two dollars and fifty six cents (\$5,762.56) with interest at the rate of six per cent per annum from the 13th day of January, 1908, until paid, together with the costs in this behalf expended to be taxed, for which let execution issue.

It is further ordered by the court, upon the motion of appellee, that the appellee, herein do have and recover of and from Frank A. Hubbell and W. H. Gillenwater, sureties on the supersedeas bond in the above entitled cause, the sum of Five thousand seven hundred and sixty two 56 100 (\$5,762.56) dollars, with interest at the rate of six per cent per annum from the 13th day of January, A. D., 1908, until paid, together with his costs in this behalf expended for which let execution issue.

And afterwards on to wit, on the sixth day of the said regular term, the same being Wednesday the 15th day of January A. D., 1908, the following among other proceedings were had and entered of record, following to wit.

99

No. 1190.

JESUS M. SANDOVAL, Appellee,
vs.
GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on upon the motion of appellants for additional time within which to file motion for rehearing in the above entitled cause and the court being sufficiently advised in the premises grants the same. It is therefore considered and adjudged by

the court that the appellant herein do have twenty days from this date within which time to file motion for rehearing.

And Afterwards, on to wit, *on* the 19th day of February A. D., 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a precipe for a writ of error, in the above entitled cause to the Supreme Court of the United States, which said precipe for a writ of error, was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908,

No. 1190,

JESUS MA. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Now comes George F. Albright, appellant in the above entitled cause and Defendant in the court below, and files his precipe for a writ of error, and requests the Clerk of the Court to issue a Writ of Error in said cause to the Supreme Court of the United States, and files herewith bond for supersedeas therein, and further asks the Clerk to prepare the necessary mandate and have the same signed by the Chief Justice of the said Court and also the order for the Supersedeas.

W. B. CHILDERS,

Attorney for Appellant.

Plaintiff in error also files herewith assignment of errors in the said cause:

Which said precipe for writ of error was and is endorsed as follows to-wit:

No. 1190.—Jesus Ma. Sandoval, appellee vs. Geo. F. Albright, appellant.—Principe for writ of error—Filed in my office this Feb. 19, 1908, Jose D. Sena, Clerk.

And Afterwards on to wit: *on* the 19th day of February, A. D., 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of error, on writ of error to the Supreme Court of the United States, which said assignment of errors was and is in words following to wit:

In the Supreme Court of the United States.

GEORGE F. ALBRIGHT, Plaintiff in Error,

VS.

JESUS MA. SANDOVAL, Defendant in Error.

Error to Supreme Court, Territory of New Mexico.

Assignment of Errors.

Plaintiff in error files the following Assignment of Errors, as a part of the record in said cause to be transmitted to the Supreme Court of the United States.

The Supreme Court of the Territory of New Mexico, erred in sustaining the following errors committed by the District Court which said cause was appealed to the Supreme Court of the Territory:

The Court erred in overruling the demurrer of the defendant to the complaint filed in said cause upon the several grounds mentioned in said demurrer.

2nd. The Court erred in holding that the appellant and defendant was responsible to the appellee and plaintiff for any fees received as the incumbent of said office.

The court erred in holding that the said complaint stated sufficient to constitute a cause of action against the appellant.

The court erred in holding that the plaintiff was qualified to hold said office, and was therefore entitled to receive the fees and emoluments thereof.

The court erred in holding that the appellant was not the incumbent of said office.

The court erred in holding that the said office was not vacant upon the date of the legislation referred to in paragraphs 7 and 8 of the defendant's answer to said complaint.

The court erred in sustaining plaintiff's demurrer as to the 1st, 3rd, 4th and 5th grounds of said demurrer, to defendant's answer.

The court erred in directing a verdict in favor of the plaintiff for the sum of \$5,360.53.

The court erred in directing any verdict whatever in favor of the plaintiff.

The court erred in overruling defendant's motion for a new trial.

The Court erred in excluding from evidence the proceedings of the Board of County commissioners under date of March 23rd.

The court erred in admitting in connection with the evidence of the witness Arthur Barker, and also in excluding the bond and oath of office of the defendant.

The court erred in excluding the question as to what precinct of Sandoval County the plaintiff lived in when he was elected sheriff, and as to whether he ever voted outside of said precinct.

W. B. CHILDERS,

Attorney for Plaintiff in Error.

102 Which said assignment of errors were and are endorsed as follows to wit: No. 1190.—In the Supreme Court of the Territory of New Mexico—January Term, A. D., 1908,—Assignment of errors—Jesus Ma. Sandoval, appellee, vs. George F. Albright, appellant,—Filed in my office this Feb. 19th, 1908, Jose D. Sena, Clerk.—W. B. Childers, Att'y for appellant.

And Afterwards on to wit, *on* the 29th day of February A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a supercedas Bond in the above entitled cause which said supercedas Bond was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1190.

JESUS M. SANDOVAL, Appellee,
vs.
GEORGE F. ALBRIGHT, Appellant.

Supercedas Bond.

Know all men by these presents, That George F. Albright, as Principal, and Frank A. Hubbell and W. H. Gillenwater, as his sureties, are held and firmly bound unto Jesus Maria Sandoval in the sum of Eleven thousand five hundred (\$11,500) dollars, lawful money of the United States, to be paid to the above named obligee, his assigns, administrators and executors, for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators and executors, jointly and severally, by these presents, sealed with our seals this 28th day of February A. D., one thousand nine hundred and eight.

The condition of the foregoing obligation is such that whereas, the above named Jesus Maria Sandoval, obtained a judgment on the 13th day of January, 1908, for the sum of five thousand,
103 seven hundred, sixty two & 58/100 (\$5762.58) dollars, together with costs of suit; and

Whereas, the said Albright applied for a writ of error from the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States,

Now, Therefore, the condition of the foregoing obligation is such that, if the above named Plaintiff in Error shall prosecute his Writ of Error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGE F. ALBRIGHT. [SEAL.]
FRANK A. HUBBELL. [SEAL.]
W. H. GILLENWATER. [SEAL.]

Sureties.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

Before me the undersigned notary public, personally appeared George F. Albright, Frank A. Hubbell and W. H. Gillenwater, who, after being duly sworn, did depose and say that they are the persons whose names are signed to the foregoing bond, and acknowledged that they signed the same for the uses and purposes therein mentioned.

And the said Frank A. Hubbell and W. H. Gillenwater, Sureties upon said Bond, did say each for himself and not one for the other that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico over and above his just debts and liabilities and the amount by law exempt from execution and forced sale.

Frank A. Hubbell, \$6,000.00.

W. H. Gillenwater, \$6,000.00.

It witness whereof, I have hereunto set my hand and affixed my official seal this 28th day of February, A. D., 1908.

[SEAL.]

THOS. K. D. MADDISON,

Notary Public.

04 This Bond as to form and sufficiency of sureties is approved by me this 2nd day of March, A. D., 1908.

WILLIAM J. MILLS,

Chief Justice.

Which said bond was and is endorsed on the back thereof as follows to wit:

No. 1190—Jesus Ma. Sandoval, Appellee, vs. George F. Albright, appellant.—Supersedeas Bond—Frank A. Hubbell and W. H. Gillenwater, sureties—W. B. Childers, Attorney for appellant—Filed in my office this Feb. 28, 1908, Jose D. Serna, Clerk.

And afterwards, on to wit, on the 2nd day of March A. D., 1908, there was entered of record the following order in the above entitled case, as follows to wit the same being entered in Vacation

No. 1190.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, County of Bernalillo.

Whereas, on the thirteenth day of January A. D., 1908, in cause No. 1190, entitled Jesus M. Sandoval, appellee, vs. George F. Albright, appellant, lately pending in this court, judgment was rendered in said court in favor of the said plaintiff and appellee and against said defendant and appellant for the sum of \$5,762.58, and costs in that behalf expended, and

Whereas, a writ of error to the Supreme Court of the United States of America, has been sued out of the office of the Clerk of this Court, by the said defendant and appellant, and

Whereas, a supersedeas bond in the sum of \$11,500, with two good and sufficient sureties has been filed in the office of the clerk
105 of this court, and the said supersedeas bond has been duly approved both as to form and sufficiency of sureties thereon.

Therefore, It is ordered by the court that all further proceedings tending to the enforcement and collection of the said judgment be and the same hereby are superseded and suspended pending the determination of the said writ of error, herein sued out, by the Supreme Court of the United States.

WILLIAM J. MILLS,

Chief Justice Supreme Court of New Mexico, etc.

Las Vegas, N. M., March 2nd, 1908.

Abd Afterwards, on to wit, on the 13th day of January, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in words following to wit:

106 In the Supreme Court of the Territory of New Mexico,
January Term, A. D. 1908.

No. 1190.

JESUS MA. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Statement of Facts.

This is a suit brought by the appellee to recover from the appellant the sum of \$6,184.16 alleged to be the amount of fees and emoluments of the office of assessor of Bernalillo County, to which the appellee had been duly elected and qualified, received by the appellant between the 27th day of March, 1903, and the 19th day of November, 1904, during which time the appellant had usurped the said office.

It is further alleged that a judgment of ouster was obtained against the appellant, but that he refused to pay over to the appellee said fees and emoluments.

Demurrer to the complaint having been overruled, answer was filed. At a later period this answer was withdrawn and an amended answer was filed, the second paragraph of which is as follows:

"The defendant admits that the plaintiff was elected at the general election held in the Territory of New Mexico, to the office of assessor of Bernalillo County, for the term of two years, from the

first day of January, A. D., 1903, and duly qualified as such assessor, as alleged in paragraph one of said complaint, but this defendant denies so much of said paragraph of said complaint as is in words and figures as follows, to wit:—And plaintiff alleges that he has ever since been, and still is, the only person lawfully authorized to discharge the duties and enjoy the emoluments and privileges appertaining to said office.” (Transcript p. 9-10.)

The appellant admitted in the 9th paragraph of his amended answer, that he had received \$6,648.80, but alleged that he had expended \$2,142.25, for clerical assistance and other necessary expenses.

By a series of allegations appellant sought to set up his title to the office in question and the ineligibility of the appellee, and by the closing paragraph of the answer he alleged that he became the incumbent of the office in good faith believing he had a right thereto, and claimed a set-off for the amount of his necessary expenses, against the claim of the appellee.

Upon demurrer, the first, second, third, fourth and fifth grounds were sustained, and the sixth, seventh and eighth grounds overruled. This left nothing of the answer except the plea of set-off to which the appellee replied, denying the claim and right of set-off, and enlarging his demand, to that admitted by appellant.

A trial by jury was had, and the jury, by direction of the Court, returned a verdict for the appellee for Five Thousand Three Hundred and sixty dollars and fifty three cents (\$5360.53) for which judgment was rendered.

Appeal and cross-appeal were prayed and granted.

Opinion of the Court.

McFIE, J.:

The parties to this suit have been before this court on two former occasions as contestants for the office of assessor of Bernalillo County, the fees and emoluments of which, are now sued for. Albright vs. Sandoval, 78 Pac. 205; Albright vs. Sandoval, 79 Pac. 719; Albright vs. Sandoval, 200 U. S., 9.

108 The right of office and that the appellee was the *de jure* officer, were fully determined in the former suits, and cannot be considered in this, therefore, the Court below, properly sustained the demurrer to all such parts of the answer as sought to raise this issue. Counsel for appellant, evidently conceding the correctness of the ruling below, admitted that the appellee was the lawful incumbent of the office, but contends, that, even so, the appellee cannot recover the fees and emoluments for the period of appellant's incumbency, but that if the court should hold otherwise, appellant would still be entitled to recover, as a set-off, the actual and necessary expenses incurred by him while he has in possession of the office; upon the ground, that he took possession in good faith, believing that he was the rightful incumbent thereof. The cross-appellant denies the correctness of this position.

Counsel for appellant, in support of his position that the appellee cannot recover, refers this court to the case of Sturh vs. Curran, 44 N. J. Law, 181. This case, according to the opinion of the majority

of the Court, does not sustain appellant's contention for in the concluding paragraph the court says: "Under the facts disclosed in this case, an action will not lie against a *de facto* officer. He yielded obedience to the law when he performed the services and on principles of natural justice he may retain the reward he has received." In deciding this case, the New Jersey Court, divided 7 to 5, and the dissenting opinion, written by Chief Justice and concurred in by four of the Associate Justices, is such a complete answer to the opinion of the majority, that practically all of the courts passing upon this question, since that case was decided, have adopted the views expressed in the dissenting opinion; so that it may be said, that the great weight of authority, both in England and America, is contrary to the doctrine declared to be the law by the majority of the Court in that case.

The case of the United States vs. Addison, 6 Wall., 291, holds, that there can be a recovery, and while the amount of the
 109 recovery is limited, the reason is, that the suit was brought upon a supersedeas bond given upon appeal; but the principle decided by the Court was that contended for in the dissenting opinion in the case of Sturh v. Curran *supra*. Chief Justice Benschly, refers to many of the cases referred to in the majority opinion, and after stating that the English authorities sustain the right of recovery, says: "with regard to the American cases, I can say, after an extended research, that not one of them that has come to my attention denies the right of the *de jure* officer to recover in some form for an intrusion into his office. Dolan vs. Mayor of New York, 68 N. Y., 274; Hunter vs. Chandler, 45 Mo., 452; Glascock vs. Lyons, 20 Ind. 1; Douglass vs. State, 31 Ind. 429; People vs. Miller, 24 Mich., 458; Dorsey v. Smith, 28 Cal. 24; Nichols vs. McLean, 101 N. Y., 538; Greits vs. Behrensmeyer, 149 Ill., 503.

Counsel for appellant, in his brief says:

"It is said the weight of authority is the other way. Much depends, in New Mexico, upon what was the common law, as we have no statute on the subject, and it is an open question for the court to decide."

It is true that we have no statute in this Territory governing this subject, but the common law in the absence of statute, authorizes a recovery by the *de jure* officer, in such cases.

In speaking of the Common law upon this subject, Selwin, 1 N. P. 81, says: "That where a person has usurped an office belonging to another, and taken the known and established fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder, for the recovery of such fees."

Chitty, also, in his work on pleadings says, that an action will lie, "against a person who has usurped an office and received the known and accustomed fees of office."

The State of Illinois, like New Mexico, adopted the common law, and still retains it except as modified by statute. The case of
 110 Kreitz vs. Behrensmeyer, 149 Ill., 496, is a very instructive case upon this subject, as the state of the law, at the time, was similar to our own. The court says:

"It is conceded that no statute exists in this State declaring the right of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer who has discharged the duties of the office under a wrongful or mistaken purpose. There is no legislation on that subject in this State. The right of recovery, if it exists, depends, therefore, on the principles of the common law.

* * * By reference to the decision of the common law courts of England, the common law of that country if to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto*, by reason of the intrusion of the latter into the office and his receipt of the emoluments thereof. Among others the following opinions of English courts may be referred to as sustaining this right of recovery: *Vaux v. Felferson*, 2 Dyer, 114; *Arris v. Stukley*, 2 Mod., 260; *Lee v. Frake*, 2 Salk, 468; *Webb's case* 8 Rep. 45. By the adoption of the common law of England the principle announced in these cases was adopted as the law of this State, for the principle is of a general nature and applicable to our condition. On the basis of a sound public policy the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit, but a loss, would result from such wrongful retention or usurpation of an office. The question has frequently been before the courts of the different States and of the United States, and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different States, and which, in most of the States, are based on the common law, without reference to any statute. * * *

"Whilst it is true that in this State a public office is not a franchise or an incorporeal hereditament, but a mere public agency created for the benefit of the State, yet the salary or emoluments annexed to a public office are incident to the right to the office, and not to the mere exercise of its duties, or its occupancy.

* * * In support of the views expressed by the Court in this case, many cases are cited, but we do not deem it necessary to refer to them, as we regard this case conclusive of the law of the case now before us, and being applied, disposes of the case, so far as the appellant is concerned. There being no doubt of the right of recovery by the appellee, and no conflict of evidence concerning the amount the appellee was entitled to recover, it was not error for the Court to direct a verdict as was done in the Court below.

A cross appeal was taken by the appellee and will now be considered.

The court below allowed to be set-off against, and deducted from the total amount received by the appellant during his incumbency of office, the sum of \$2,142.25, which was shown to be the amount of expenses incurred in administering the affairs of the office.

Counsel for cross-appellant does not question the amount of the set-off, nor seeks relief upon any technical ground of error; but on

the contrary, takes the broad ground, that cross-appellant is entitled to recover the full amount of the fees and emoluments received by appellant, Albright, during his incumbency, without any allowance whatever, for the expenses incurred in conducting the affairs of the office. In other words, that cross-appellant is entitled to the gross receipts, and not the *the* profits of the office.

There is some conflict of authority on this subject, but the weight of authority is to the effect, that where the *de facto* officer entered in good faith, believing he was entitled to the office, the profits, and not the entire amount received, are recoverable.

A leading case to this effect, is Mayfield v. Moore, 53 Ill., 428.

Counsel for cross-appellant has expressed criticism of this case, but we find the law as therein declared, adhered to in the latter cases. Farwell vs. Adams, 112 Ill., 52; Waterman vs. Chicago & Iowa I. T. Co., 139 Ill 669; Kreitz v. Behrensmeyer, 149 Ill., 496; Am. & Eng. Ency. of Law, Vol. 23, p. 403-404; Am. & Eng. Corp. cases (Texas) Vol. 9, p. 91.

The acts of the legislature providing for the appointment of an assessor for Bernalillo County, and the testimony of Albright as to his appointment and that he entered upon the office under advice of counsel, were before the Court when the Court directed the jury to allow the set-off, and we think the good faith of Albright must be conceded from these facts, aided, as they were, by the stubborn contest in the Courts to settle the title to the office in dispute, disclosed by the decisions of this Court, of which the trial Court took judicial notice.

The question of good faith seems to be the controlling consideration for the allowance of expenses to an ousted *de facto* officer, in a majority of cases thus holding, and the rule would doubtless not be applied in case of an intruder entering in bad faith and without color of right.

We feel disposed to adhere to the rule in this case, and therefore, hold, that the Court below did not commit error in allowing the amount shown by the evidence as the reasonable expenses of appellant's administration of the office, and instructing the jury to that effect.

The judgment of the Court below, both upon the original and cross-appeals, will be affirmed with costs, it is so ordered.

JOHN R. McFIE,

Associate Justice.

We Concur:

WILLIAM J. MILLS, C. J.
EDWARD A. MANN, A. J.
FRANK W. PARKER, A. J.
WM. H. POPE, A. J.

Abbott, A. J., having heard this case in the court below did not participate in this decision.

113 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing one hundred and twelve pages contain a full, true, perfect and complete copy of the record and proceedings, pleadings and opinion filed in the above entitled cause, which is hereby transmitted to the Supreme Court of the United States in accordance with the writ of error hereto attached.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico this the 4th day of March, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 21,097. New Mexico Territory Supreme Court. Term No. 116. George F. Albright, plaintiff in error, vs. Jesus Maria Sandoval. File No. 21,098. Term No. 117. Jesus Maria Sandoval, plaintiff in error, vs. George F. Albright. Filed April 8th, 1908. File Nos. 21,097 and 21,098.



Book 19/08

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. ~~117~~ 118.

GEORGE F. ALBRIGHT, APPELLANT,

vs.

JESUS MARIA SANDOVAL.

**APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.**

FILED APRIL 8, 1908.

(21,099.)



(21,099.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 336.

GEORGE F. ALBRIGHT, APPELLANT,

vs.

JESUS MARIA SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it Remembered, that heretofore, on to-wit on the 15th day of April, A. D., 1907, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein pending, entitled Jesus M. Sandoval, Appellee, *vs.* George F. Albright, appellant, Numbered 1204, which said transcript of record was and is in words and figures following to-wit:

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. —.

J. M. SANDOVAL, Appellee,

vs.

Geo. F. ALBRIGHT, Appellant.

Appeal from District Court Bernalillo County.

Transcript of Record.

Be it remembered that heretofore, on to-wit, the 16th day of October, 1906, there was filed in the office of the clerk of the District Court of the Second Judicial District, within and for the County of Bernalillo, a Bill of Complaint in a certain cause wherein Jesus M. Sandoval was the plaintiff and George F. Albright was the defendant; which said Bill of Complaint is in the words and figures following: to-wit:

TERRITORY OF NEW MEXICO.

Bernalillo District Court.

3 No. 7241.

JESUS M. SANDOVAL,

vs.

GEORGE F. ALBRIGHT.

Complaint.

The plaintiff, Jesus M. Sandoval, a resident of the County of Sandoval, in the Territory of New Mexico, complains of the defendant, George F. Albright, a resident of the County of Bernalillo, in the Territory of New Mexico, and alleges:

I.

That at the general election held in the Territory of New Mexico on the fourth day of November, 1902, the plaintiff was duly elected

to the office of assessor of Bernalillo County for the term of two years from the first day of January, 1903, and until his successor should be duly elected and qualified. And thereafter plaintiff duly qualified as such assessor, by taking the oath and executing the bond prescribed by law, and entered upon the duties of said office. Plaintiff alleges that he thereby became the only person lawfully authorized to discharge the duties and enjoy the emoluments and privileges appertaining to said office, until the thirty-first day of December, 1904.

II.

Plaintiff further alleges that on the twenty-seventh day of March, 1903, the defendant, George F. Albright, without authority of law, and in violation of the right of this plaintiff, intruded himself into the said office of assessor of Bernalillo County, New Mexico, and

4 usurped the same, and excluded the plaintiff therefrom until the nineteenth day of November, 1904, when this plaintiff,

by the consideration and judgment of this honorable court, in a certain proceeding entitled *The Territory of New Mexico, on the relation of Jesus M. Sandoval, against George F. Albright*, was restored to the possession of said office, copy of which judgment is filed herewith and marked "Exhibit A" and is prayed to be taken and considered as part of this complaint.

III.

Plaintiff further alleges that on the twenty-fifth day of July, 1905, the defendant, George F. Albright, received from the territorial auditor of the Territory of New Mexico two several warrants drawn in his favor on the territorial treasury, one for the sum of one thousand five hundred and nineteen dollars and seventy-four cents (\$1,519.74), and the other for the sum of forty-two dollars and fourteen cents (\$42.14), amounting in all to the sum of one thousand, five hundred and sixty-one dollars and eighty-eight cents (\$1,561.88), and thereafter received from the territorial treasury the said sum of one thousand, five hundred and sixty-one dollars and eighty-eight cents (\$1,561.88) of the lawful fees and emoluments appertaining to the said office of assessor of Bernalillo County aforesaid, and converted the same to his own use, and has ever since refused, and still refuses, to pay over the same, or any part thereof, to this plaintiff, who is lawfully entitled to demand and receive the same.

5 *Wherefore* plaintiff brings this suit and prays judgment against the defendant, George F. Albright, for the said sum of one thousand five hundred and sixty-one dollars and eighty-eight cents (\$1,561.88) with interest thereon at the rate of six per cent, per annum from the said 25th day of July, 1905, until paid, together with his costs in this behalf expended, and for all other proper relief.

NEILL B. FIELD,
Attorney for Plaintiff.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

Jesus M. Sandoval, being first duly sworn, on his oath deposes and says that he is the plaintiff in the above entitled cause, that he has read the foregoing complaint and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to those parts which are made upon information and belief, and as to those parts he believes the same to be true.

J. M. SANDOVAL.

Subscribed and sworn to before me by Jesus M. Sandoval this 16th day of October, 1906:

[NOTARIAL SEAL.]

DAVID A. LAWSON,
Notary Public, Bernalillo Co., N. M.

"EXHIBIT A."

(Copy of Judgment Entered November 19th, 1904.)

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court

TERRITORY OF NEW MEXICO *vs.* REL JESUS MARIA SANDOVAL.

Relator.

vs.

GEORGE F. ALBRIGHT, Respondent.

This day this cause coming on to be heard, upon the motion of the relator for judgment upon the pleadings, and the Court having read the same and being fully advised in the premises, said motion is by the Court sustained, as to the third and fourth paragraphs thereof.

Wherefore it is Considered, Ordered, Adjudged and Decreed by the Court that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the County of Bernalillo and the Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with or attempting to perform the duties or exercise the functions of the office of assessor of the County of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of assessor of the County of Bernalillo and Territory of New Mexico as the lawful custodian thereof.

It is further Considered, Ordered, Adjudged and Decreed by the Court that the relator, Jesus Maria Sandoval, do have and recover of and from the respondent, George F. Albright, his costs in this behalf expended to be taxed, and may have execution therefor.

To the rendition of the foregoing judgment the respondent hereby excepts and prays the Court to grant him an appeal and to fix the amount of a bond for supersedeas and to grant him a supersedeas upon filing proper bond in accordance with the amounts so fixed, to be approved by the Court; which prayer for an appeal and for the fixing and acceptance of a supersedeas bond by the Court denies; and to which action of the Court denying the same the respondent, by his counsel, excepts.

B. S. BAKER, *Judge*.

(Endorsed:) "Filed in my office this Oct. 16, 1906, John Venable, Clerk."

And Thereafter, on to-wit, the 3rd day of November, 1906, there was filed in the office of the clerk of said court, in said cause, the Answer of defendant; which said Answer is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO, *County of Bernalillo*:

In the District Court,

No. 7241.

JESUS M. SANDOVAL

vs.

GEORGE F. ALBRIGHT.

Answer.

George F. Albright, the defendant in the above entitled cause, answers the said complaint as follows:

I.

The defendant admits the said plaintiff was elected at the general election held in the Territory of New Mexico, to the office of assessor of the County of Bernalillo, for the term of two years from the first day of January, 1903, and duly qualified as such assessor, as alleged in paragraph one of said complaint; but this defendant denies so much of said paragraph as is in words as follows, to-wit: "Plaintiff alleged that he thereby became the only person lawfully authorized to discharge the duties and enjoy the emoluments and privileges appertaining to said office, until the thirty-first day of December, 1904."

II.

As to the allegations contained in paragraph two of said complaint, defendant denies that on the 27th day of March, 1903, or at any other time, he without authority of law and in violation of the rights of plaintiff, intruded himself into the said office of assessor of Berna-

lillo County, New Mexico, and usurped the same and excluded the plaintiff therefrom.

III.

This defendant admits that he has received and appropriated to his own use the sum of \$1,561.88, of the lawful fees and emoluments appertaining to the said office of assessor of the County of Bernalillo, received from the territorial treasury, as alleged in paragraph three of said complaint.

IV.

Further answering, defendant admits that a judgment was rendered in the district court for the County of Bernalillo, on the 19th day of November, 1904, in that certain cause entitled, "The Territory of New Mexico on the relation of Jesus M. Sandoval, against George F. Albright," adjudging that this defendant was not entitled to said office and had usurped the same and that said plaintiff was lawfully entitled to the same, but defendant does not admit that the copy of said judgment filed as "Exhibit A" to said complaint is a correct copy thereof, and calls for the production in evidence of the original judgment entered in said cause.

9

V.

Defendant further alleges that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed assessor of the County of Bernalillo and duly qualified as such by filing his bond and oath of office, by the Board of County Commissioners of Bernalillo County, acting under and by virtue of Section 3 of an Act of the legislative assembly of the Territory of New Mexico, entitled "An Act to create the County of Sandoval," approved March 10, 1903," and as amended by an Act entitled, "An Act to Amend Section 3 of an Act entitled 'An Act to Create the County of Sandoval,' approved March 12th, 1903."

VI.

Further answering, defendant alleges that the office of assessor of the County of Bernalillo became and was vacant by reason of said legislation and creation of the County of Sandoval, it having been previously a part of the County of Bernalillo; said legislation being for the purpose of dividing the County of Bernalillo and creating the County of Sandoval; that the legislature had full power and authority to pass said acts and every part thereof, and thereby vest in the county commissioners of the County of Bernalillo the power to appoint this defendant, or such other person as they saw fit to select, to the office of assessor for the new County of Bernalillo, as the same existed from and after the date of the passage of said acts. Defendant further alleges that the office was subject to the control of the legislature and that a vacancy thereafter was created by the said acts above referred to.

Further answering, defendant alleges that by virtue of an Act entitled, "An Act to Create the County of Sandoval, approved March 10, 1903," there was created the County of Sandoval in the Territory of New Mexico, and that the said plaintiff at the time of the creation of the said County of Sandoval was and had been for a long time and many years previous thereto, a resident of the portion of Bernalillo County which was incorporated into and made the County of Sandoval, and that by virtue of the passage of the said acts creating the County of Sandoval, the said plaintiff became and was and still is a resident of the said County of Sandoval and not of the County of Bernalillo, and thereupon the said plaintiff ceased to be upon the passage of the said acts a resident of the County of Bernalillo and was disqualified from exercising the duties of the office of assessor of the County of Bernalillo to which he had theretofore been elected, and at the time of the appointment and qualification of this defendant as such assessor, by virtue of his appointment by the board of county commissioners under and by virtue of the act of the legislative assembly of the Territory of New Mexico, entitled "An Act to Amend Section 3 of an Act entitled 'An Act to Create the County of Sandoval, approved March 10, 1903,' approved March 12th, 1903," such office was and had been since the date of the creation of the said County of Sandoval, vacant.

W. B. CHILDERS,
Attorney for Defendant.

11 TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

George F. Albright, being duly sworn, on oath deposes and says that he is the defendant in the above entitled cause; that he has read the foregoing answer, knows the contents thereof and that the same are true, except as to such matters and things as are therein stated to be upon information and belief, and those he verily believes to be true.

GEORGE F. ALBRIGHT.

Subscribed and sworn to before me this 30th day of October, 1906.

[NOTARIAL SEAL.]

THOS. K. D. MADDISON,
Notary Public.

(Endorsed:) "Filed in my office this Nov. 3, 1906. John Venable, Clerk.

And Thereafter, on to-wit, the 6th day of November, 1906, there was filed in the office of the clerk of said court, in said cause, plaintiff's motion for judgment on pleadings; which said motion is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

No. 7244.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEO. F. ALBRIGHT, Defendant.

Motion for Judgment on Pleadings.

Comes now the plaintiff by his attorney and moves the Court for a judgment on the pleadings in the above entitled cause; and for ground of said motion shows:

I.

That the denials contained in the answer of the defendant
12 are overborne by the admissions contained therein, and it affirmatively appears from the allegations of the said answer that the plaintiff is entitled to judgment for the sum of fifteen hundred and sixty-one dollars and eighty-eight cents (\$1,561.88).

NEILL B. FIELD,

Attorney for Plaintiff.

Notice.

To George F. Albright, the defendant, and W. B. Childers, his attorney:

You will please take notice that the plaintiff will on Monday, the twelfth day of November, 1906, about the hour of 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, call up for disposition the foregoing motion for judgment in the above entitled cause.

Very respectfully,

NEILL B. FIELD,

Attorney for Plaintiff.

(Endorsed:) "Filed in my office this Nov. 6, 1906. John Venable, Clerk."

And Thereafter, on to-wit, the 3rd day of December, 1906, there was filed in the office of the clerk of said court, in said cause, the defendant's Amendment to Answer; which said Amendment is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court.

No. 7241.

JESUS M. SANDOVAL, Plaintiff,
vs.
GEORGE F. ALBRIGHT, Defendant.

Amendment to Answer.

Now comes George F. Albright, defendant in the above
13 entitled cause, and files an amendment to the answer heretofore filed by him, said amendment to be inserted at the end of and made a part of paragraph 4 on page 2 of said answer; which said amendment is as follows, to-wit:

Defendant alleges that after said judgment was rendered a writ of error was sued out from the Supreme Court of the Territory of New Mexico to the court in which said judgment was rendered, and that the said cause was thereupon reviewed and judgment of affirmance rendered therein; and defendant files herewith a copy of the transcript of the proceedings in said cause, which is in every way full and complete and upon which the said judgment of affirmance was rendered by the Supreme Court of the Territory of New Mexico, affirming said judgment of the Second Judicial District Court, for the County of Bernalillo, with a modification of the same, which said modification is immaterial so far as this suit is concerned; said transcript the said defendant asks to be taken as and made a part of this answer, marked "Exhibit A."

Defendant further alleges that thereafter an appeal was taken from the decision of the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States, which said appeal was dismissed for want of jurisdiction by the said Supreme Court of the United States.

W. B. CHILDERS,
Attorney for Defendant.

14 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. —.

TERRITORY OF NEW MEXICO *ex rel.* JESUS M. SANDOVAL,
Defendants in Error,

vs.

GEORGE F. ALBRIGHT, Plaintiff in Error.

Writ of Error to the District Court, Bernalillo County.

Transcript of Record and Proceedings in Case No. 6395.

Be it remembered that heretofore, on to-wit, the 21st day of November, 1904, there was filed for record in the office of the clerk of the District Court a Writ of Error issued out of the Supreme Court of the Territory of New Mexico in the case of the Territory of New Mexico *ex rel.* Jesus M. Sandoval, defendant in error, *vs.* George F. Albright, plaintiff in error, commanding the clerk of the Second Judicial District Court to certify the record and proceedings in a case lately therein pending, entitled, "Territory of New Mexico
15 *ex rel.* Jesus M. Sandoval, plaintiff, *vs.* George F. Albright, defendant, which said writ of Error is in words and figures following: to-wit:

Territory of New Mexico to the District Court of the Second Judicial District of the Territory of New Mexico, sitting within and for the County of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of judgment, in a certain cause lately pending before you, wherein the Territory of New Mexico *ex rel.* Jesus M. Sandoval was plaintiff, and George F. Albright was defendant, error has intervened as it is said, to the damage of the said George F. Albright, defendant, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the Supreme Court of the Territory of New Mexico, together with this writ, so that you have the same in the said Supreme Court on the first day of the next term thereof, to be begun and held on the first Wednesday after the first Monday in January, A. D. 1905, at Santa Fe, in said Territory, in pursuance of law.

Witness, the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the seal of the said Court, this 19th day of November, A. D. 1904.

JOSE D. SENA, Clerk.

(Endorsed, Filed in my office the 21st day of November, 1904.
W. E. Damm, Clerk.)

16 Be it remembered that heretofore; on to-wit, the 20th day of July, 1903, there was filed in the office of the clerk of the District Court of the Second Judicial District of the Territory of New Mexico, sitting within and for the County of Bernalillo, a motion for rule in a certain cause entitled the Territory of New Mexico on the relation of Jesus Maria Sandoval, *versus* George F. Albright, which said motion is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo County District Court, March Term, A. D. 1903.

THE TERRITORY OF NEW MEXICO on the Relation of JESUS MA.
SANDOVAL

vs.

GEORGE F. ALBRIGHT.

Motion for Rule.

Now comes Edward L. Bartlett, Solicitor General of the Territory of New Mexico on behalf of the people thereof and files the affidavit of Jesus Ma. Sandoval and moves the Court for a rule to be made on George F. Albright of Bernalillo County aforesaid, to show cause if any he has, why he, the Solicitor General, should not have leave to file the information in the nature of a *quo warranto* in this Court, on behalf of the people of the Territory of New Mexico on the relation of Jesus Ma. Sandoval against said George F. Albright for having unlawfully usurped and intruded into and for unlawfully executing and holding and performing the duties of the office of Assessor of Bernalillo County, New Mexico.

EDWARD L. BARTLETT,

Solicitor General of the Territory of New Mexico.

(Endorsed: Filed in my office this July 20th, 1903. W. E. Dame, Clerk.)

17 And thereafter, to-wit, on the 20th day of July, 1903, there was filed in the office of the Clerk of said Court in said cause the affidavit of Jesus M. Sandoval, which said affidavit is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO,

County of Bernalillo.

Jesus Ma. Sandoval, of lawful age, being first duly sworn on his oath, deposes and says, that at the general election held in the Territory of New Mexico on the 4th day of November, 1902, he was duly elected to the office of Assessor of Bernalillo County for the term of two years from the 1st day of January, 1903, and until his successor is duly elected and qualified; that he received from the proper officers of Bernalillo County a certificate of said election and thereafter and

within the time prescribed by law he duly qualified as such Assessor by taking the oath and executing the bond prescribed by law and entered upon the discharge of the duties of said office and ever since has been and still is the only person lawfully authorized to discharge the duties and to enjoy the emoluments and privileges appertaining to said office; that he has never resigned the said office, nor has the same been abolished, nor has he been removed therefrom by any competent authority, and the term for which he was elected will not expire until the 1st day of January, 1905. That the fees and emoluments of said office are of great value, to-wit, of the value of six thousand dollars per annum, and affiant has a vested interest in said fees and emoluments of which he can not be lawfully deprived without due process of law, and that said office has not been at any time since affiant entered upon the discharge of the duties thereof, vacant or without an incumbent competent and qualified to discharge the duties and transact the public business appertaining thereto.

18. Affiant further states that the Board of County Commissioners of Bernillo County pretending to act as affiant is interposed under the authority of the provisions of an act of the Legislative Assembly of the Territory of New Mexico, entitled "An Act to Create the County of Sandoval," approved March 10th, 1903, as the same was amended by an act entitled "An act to amend section 3 of an act entitled an act to create the County of Sandoval," approved March 12th, 1903, did on the 27th day of March, 1903, attempt and pretended to induct one George F. Albright to be Assessor of the County of Bernillo aforesaid for the portion of the term of this affiant which had not and has not expired, and on the same day the said George F. Albright by stealth and fraud, claiming to act under said pretended appointment, unlawfully took possession of the room in the Court House of said County assigned to the use of the Assessor, and also took possession of the books, papers and other insignia of the said office, and has ever since claimed and assumed to be the Assessor of said County and usurps the said office and excludes this affiant therefrom, and unlawfully receives and appropriates to the exclusion of this affiant the fees and emoluments of said office, as aforesaid.

Affiant alleges that the said legislation, in so far as it attempts to deprive this affiant of his rights in said office and to authorize the selection or appointment of any other person to be Assessor of Bernillo County for the unexpired term for which this affiant was elected, is void because it is in contravention of the provisions of the Constitution of the United States and of the legislation of Congress, and affiant prays that there may be a judicial inquiry as to the title of this affiant and of the said George F. Albright to the said office of Assessor of Bernillo County.

JESUS M. SANDOVAL.

19. Subscribed and sworn to before me by Jesus Ma. Sandoval this 20th day of July, 1903.

[NOTARIAL SEAL.]

FRANK ACKERMAN,

Notary Public, Bernillo County.

(Endorsed.) Filed in my office this July 20th, 1903. W. E. Dancy, Clerk.)

And thereafter, on to-wit, the 20th day of July, 1903, there was entered of record in the office of the Clerk of the said Court, in said cause, an order, which said order is in words and figures following, to-wit:

On reading and filing the affidavit of Jesus Maria Sandoval, and the motion of the Solicitor General founded thereon, it is ordered that George F. Albright show cause before this Court on Tuesday the 21st day of July, 1903, at 10 o'clock A. M., why the said Solicitor General shall not have leave to file an information in the nature of *quo warranto* against him for usurping the office of Assessor of Bernalillo County.

Service of a copy of this order to be made on George F. Albright during this 20th day of July, 1903, by any disinterested person.

B. S. BAKER, *Judge*.

I, George F. Albright, hereby acknowledge service this 20th day of July, 1903.

GEO. F. ALBRIGHT.

(Endorsed: Filed in my office this July 20th, 1903. W. E. Dune, Clerk.)

And thereafter, on to-wit, the 21st day of July, 1903, there was entered of record in the office of the Clerk of said Court, in said cause, an order granting leave to file information, etc., which said order is in words and figures following, to-wit:

20 TERRITORY OF NEW MEXICO on the Relation of JESUS
MARIA SANDOVAL

vs.

GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the motion of the Solicitor General, to show cause, the Court, upon consideration, grants the same; and leave is hereby given to file an information in the nature of a *quo warranto*.

It is ordered by the Court that the defendant, George F. Albright, be and he hereby is ordered to make answer on Thursday at 9:30 A. M., July 23rd, 1903.

The defendant being present in court in person, and by counsel, waives service of copy of information.

And thereafter, on to-wit, the 21st day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, an Information, which said Information is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo County District Court, March Term, A. D. 1903.

TERRITORY OF NEW MEXICO on the Relation of JESUS MA. SANDOVAL

vs.
GEORGE F. ALBRIGHT.

Information.

Edward L. Bartlett, Solicitor General for the Territory of New Mexico, who prosecutes for and on behalf of the people of the Territory of New Mexico on the relation of Jesus Ma. Sandoval of the County of Bernalillo aforesaid, comes here in the Court and gives the Court to understand and be informed, that at the general election held in the Territory of New Mexico on the 4th day of November, 1902, Jesus Ma. Sandoval was duly elected to the office of Assessor of the County of Bernalillo aforesaid, and received from the proper officers of said County a certificate of his election to the said office; that thereafter and within the time prescribed by law the said Jesus Ma. Sandoval duly qualified and entered upon the discharge of the duties of the said office of Assessor aforesaid, and has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office; that the said Jesus Ma. Sandoval has never resigned from nor vacated his said office, nor has the term for which he was elected expired, nor has the said office become vacant, nor has it been without a lawful incumbent at any time since the said Jesus Ma. Sandoval qualified and entered upon the discharge of the duties of said office. Nevertheless one George F. Albright on the 23rd day of March, 1903, and while the said Jesus Ma. Sandoval was in possession of said office and engaged in the discharge of the duties thereof, by stealth and fraud and without authority of law did unlawfully usurp the said office of Assessor of Bernalillo County and did take possession of the room assigned for the use of the Assessor of Bernalillo County in the Court House of said County, and of the books, papers and other insignia of said office, and has ever since assumed to be Assessor of Bernalillo County aforesaid, and by such unlawful usurpation and intrusion has become possessed of the said office of Assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Territory of New Mexico.

II.

And the said Solicitor General on the relation of said Jesus Ma. Sandoval, further gives the Court here to understand and be informed that on the 23rd day of March, 1903, George F. Albright unlawfully took possession of and held and still does unlawfully hold the office of Assessor of Bernalillo County, and claims to hold the same and to be the lawful incumbent of said office

by virtue of a pretended appointment thereto by the Board of County Commissioners of Bernalillo County which was pretended to be made by authority of an act of the Legislative Assembly of the Territory of New Mexico, entitled "An act to create the County of Sandoval," approved March 10th, 1903, as amended by an act entitled "An act to amend section 3 of an act entitled 'An act to create the County of Sandoval,' " approved March 12th, 1903.

Which said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person than the said Jesus Ma. Sandoval to be Assessor of the County of Bernalillo aforesaid for the term for which the said Jesus Ma. Sandoval had been theretofore elected by the qualified electors of Bernalillo County as in the first count thereof set forth, in that the said legislation attempts to deprive the said Jesus Ma. Sandoval of his right to said office for the full term for which he was elected without due process of law and deprives the said Jesus Ma. Sandoval of the equal protection of the laws and is therefore in contravention of the provisions of the Constitution of the United States, and in that the said legislation is a special law regulating County affairs and granting special privileges to the Board of County Commissioners of Bernalillo County and is in contravention of the legislation of Congress and is not within the grant of legislative power granted by Congress to the Territorial

Legislature, in that the same is not, so far as it attempts to
 23 deprive the said Jesus Ma. Sandoval of the office of Assessor of Bernalillo County for a portion of the term for which he was elected, a rightful subject of legislation by the said Territorial Legislature, and the said George F. Albright therefore holds the said office and assumes to discharge the duties thereof wrongfully, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Territory of New Mexico. -

EDWARD L. BARTLETT,

Solicitor General for the Territory of New Mexico.

(Endorsed: Filed in my office this July 21st, 1903 W. E. Dame, Clerk.)

And thereafter, on to-wit, the 23rd day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, a Demurrer to the Information, which said Demurrer was in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, *County of Bernalillo*;

In the District Court,

TERRITORY OF NEW MEXICO *vs Rel.* JESUS MARIA SANDOVAL
vs.

GEORGE F. ALBRIGHT,

Defendant.

Now comes the respondent, George F. Albright, by W. B. Childers, his attorney, and demurs to the information filed in the above entitled cause, and for ground of demurrer alleges:

1. That the said information does not state facts sufficient in law on which to base the writ issued in said cause.

2. Because it affirmatively appears in and by said information that the respondent holds said office of Assessor of the County of Bernalillo under and by virtue of an appointment by the Board of County Commissioners of Bernalillo County, made under and by virtue of the authority in them vested by section 3 of an act entitled "An act to amend section 3 of an act entitled 'An act to create the County of Sandoval,' approved March 10, 1903," approved March 12, 1903, of the Thirty-fifth Legislative Assembly of the Territory of New Mexico.

3. Because the relator has no vested right, title and interest and had no right, title and interest in and to said office of Assessor, and the said office was under the power and control of the Legislative Assembly of the Territory of New Mexico.

4. Because in appointing the respondent Assessor of the County of Bernalillo the Board of County Commissioners acted in due conformity and in all respects with law and under and by virtue of the act of the Legislative Assembly set up in said information and above set forth.

5. Because the said act is not in contravention of the provisions of the Constitution of the United States, and is valid and constitutional in all respects.

6. Because the said information does not state facts sufficient to entitle the relator to the relief prayed for.

Wherefore, respondent prays that the said information may be dismissed and the said writ quashed.

W. B. CHILDERS,

Attorney for Respondent

(Endorsed Filed in my office this July 28th, 1903 W. F. Dams, Clerk.)

And thereafter, on to-wit, the 23rd day of July, 1903, there was filed in the office of the Clerk of said Court, in said cause, the Answer of Respondent, which said answer is in words and figures following, to-wit: -

TERRITORY OF NEW MEXICO, *County of Bernalillo*:

In the District Court.

TERRITORY *ex Rel.* JESUS MARIA SANDOVAL, Relator,

vs.

GEORGE F. ALBRIGHT, Respondent.

Answer.

Now comes George F. Albright, respondent in the above entitled cause, and for answer to the information filed against him, says:

1. That he admits that at the general election held in the Territory of New Mexico on the fourth day of November, A. D. 1902, Jesus Maria Sandoval was duly elected to the office of Assessor of the County of Bernalillo and received from the proper officers of said county a certificate of his election to said office; that thereafter and within the time prescribed by law, the said Jesus Maria Sandoval duly qualified and entered upon the discharge of the duties of said office of assessor as aforesaid; but respondent denies that the said Jesus Maria Sandoval has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office and denies that the said Jesus Maria Sandoval is at the present time so qualified or has been so qualified since the tenth day of March, A. D. 1903.

2. Further answering the respondent says that he has no information as to whether or not the said Jesus Maria Sandoval has resigned his said office, but he denies that the said office did not become vacant and was not vacated by the said Jesus Maria Sandoval. Respondent admits that the term for which the said Jesus Maria Sandoval was elected has not expired, that is to say, this respondent alleges that the said Jesus Maria Sandoval was elected to fill the office of Assessor of the County of Bernalillo for the term beginning the first day of January, A. D. 1903, and the said term being for two years from that date, but this respondent alleges that the said office became vacant on the tenth day of March, A. D. 1903, in the manner hereinafter alleged.

3. This respondent further answering alleges that on the 23d day of March, 1903, this respondent was lawfully appointed to said office as hereinafter alleged, and further alleges that the said office was vacant at the time he was so lawfully appointed, and denies that the said Jesus Maria Sandoval was in possession of the said office, engaged in the discharge of the duties thereof, and further answering, denies that by stealth and fraud and without authority of law did unlawfully usurp the said office and did unlawfully take possession of the room assigned for the use of the Assessor of Bernalillo County in the court house of said county, and the book, papers and other insignia of said office. Respondent alleges that after having been duly appointed and qualified as Assessor by filing his bond and oath of office as required by law, on the day aforesaid

he demanded possession of the office and said books and papers from one Jesus Garcia, who was then in possession of the same, and the said Jesus Garcia, who had formerly been a deputy under the said Jesus Maria Sandoval, peacefully delivered possession of the said room and said books, papers and other insignia of the office to this respondent.

4. Further answering, this respondent admits that he has ever since assumed to be the Assessor of Bernalillo county and alleges he is the lawful assessor of said county, and denies that by any unlawful usurpation and intrusion he has become possessed of the said office of assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico, as alleged in said information, and alleges that he is the lawful incumbent thereof and entitled to the emoluments, immunities and privileges appertaining and belonging to the same.

5. For answer to the second cause of action in said information alleged, this respondent says that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed Assessor of the County of Bernalillo, and duly qualified as such aforesaid by filing his bond and oath of office, by the Board of County Commissioners of Bernalillo county, acting under and by virtue of Section 3 of an Act of the Legislative Assembly of the Territory of New Mexico entitled "An Act to create the County of Sandoval," approved March 10, 1903," and as amended by an act entitled, "An Act to amend Section 3 of an act entitled "An Act to create the County of Sandoval," approved March 12th, 1903; and this respondent, further answering, denies that the said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person other than the said Jesus Maria Sandoval to be assessor of the County of Bernalillo aforesaid for the unexpired part of the term for which the said Jesus Maria Sandoval had been theretofore elected by the qualified electors of Bernalillo county as in the first count of said information set forth; and denies that the said act in said particulars is void in law because the said legislation attempts to deprive the said Jesus Maria Sandoval of his right to said office for the full term for which he was elected without due process of law and to deprive the said Jesus Maria Sandoval of the equal protection of law and is, therefore in controvention of the provisions of the Constitution

28 of the United States and in that the said legislation is a special law regulating county affairs and granting special privileges to the Board of County Commissioners of Bernalillo county and is in controvention of the legislation of Congress and not within the grant of legislative power granted by Congress to the territorial legislature in that the same is not in so far as it attempts to deprive the said Jesus Maria Sandoval of the office of assessor of Bernalillo county for a portion of the term for which he was elected a rightful subject of legislation by said territorial legislature, but respondent alleges that the said legislation is valid in every particu-

lar and fully authorized and empowered the County Commissioners to appoint this respondent to said office.

6. Further answering, this respondent alleges that the office of assessor of the County of Bernalillo became and was vacant by reason of said legislation and creation of the County of Sandoval, it having been previously a part of the County of Bernalillo; said legislation being for the purpose of dividing the County of Bernalillo, and creating the County of Sandoval; that the legislature had full power and authority to pass said acts and every part thereof, and thereby vest in the County Commissioners of Bernalillo county the power to appoint this respondent, or such other person as they saw fit to select, to the office of assessor for the new County of Bernalillo, as the same existed from and after the date of the passage of said acts. Respondent further alleges that the office was subject to the control of the legislature and that a vacancy thereafter was created by said acts above referred to.

7. Further answering, this respondent alleges that by virtue of an act entitled "An Act to create the County of Sandoval," approved

March 10, 1903, there was created the County of Sandoval
29 in the Territory of New Mexico, and that the said relator at the time of the creation of said County of Sandoval was and

had been for a long time and many years previous thereto, a resident of the portion of Bernalillo county which was incorporated into and made the County of Sandoval, and that by virtue of the passage of said act creating the County of Sandoval, the said relator became and was and still is a resident of the said County of Sandoval and not of the County of Bernalillo, and thereupon the said relator ceased to be upon the passage of said act a resident of the said County of Bernalillo and was disqualified from exercising the duties of the office of assessor of the said County of Bernalillo to which he had theretofore been elected, and at the time of the appointment and qualification of this respondent as such assessor, by virtue of his appointment by the Board of County Commissioners under and by virtue of the Act of the Legislative Assembly of the Territory of New Mexico, entitled "An act to amend an act entitled 'An Act to create the County of Sandoval,' approved March 10, 1903, approved March 12, 1903, as alleged in the information in this cause, such office was and had been since the date of the creation of the said County of Sandoval, vacant; and the said respondent denies that he holds the said office and assumes to discharge the duties thereof wrongfully and contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico.

W. B. CHILDERS,

Attorney for Respondent.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

George F. Albright, being duly sworn, on oath, deposes and says that he is the respondent in the above entitled cause, that he

30 has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained are true.

GEO. F. ALBRIGHT.

Subscribed and sworn to before me this 24th day of July, A. D. 1903.

[NOTARIAL SEAL.]

E. L. MEDLER,
Notary Public.

(Endorsed: Filed in my office this July 23rd, 1903. W. E. Dunc, Clerk.)

And thereafter, on to-wit, the 24th day of July, 1903, there was filed in the office of the clerk of said Court, in said cause, a Demurrer to the Answer of Respondent, which said Demurrer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court,

TERRITORY *ex Rel.* JESUS M. SANDOVAL,

vs.

GEORGE F. ALBRIGHT.

Comes now the Solicitor General and says that the said answer of the said respondent is not sufficient in law to establish the title of said respondent to the office of Assessor of Bernalillo county and shows to the Court the following causes of demurrer to the said answer, to-wit:

I.

Because the division of the Territory of the County of Bernalillo did not take place under the acts of the legislature relied and said act did not become operative as to such division until April 14th, 1903.

II.

Because on the 23rd day of March, 1903, the relator was a resident of the County of Bernalillo and the County of Sandoval had no Territorial existence until April 14th, 1903.

31

III.

Because the legislature could not create a vacancy in the relator's office because of his non-residence of the County of Bernalillo when he was both as a matter of law and fact a resident of the County of Bernalillo as appears by the allegations of said answer certainly until April 14, 1903.

IV.

Because the allegations of said answer affirmatively show that the relator and not the respondent is entitled to said office.

V.

Because the respondent George F. Albright was and is ineligible to the said office if it is a new office as alleged in said answer, as this Court will take judicial notice of the fact that he is a member of the legislative council which passed said acts and as such is incompetent to hold any office created by said council.

VI.

Because the said answer does not state facts showing that respondent is entitled to said office and is otherwise insufficient to constitute a defense to this action.

Wherefore, etc.

E. L. BARTLETT,
Solicitor General.

(Endorsed: Filed in my office this July 24th, 1903. W. E. Dame, Clerk.)

And thereafter, on-wit, the 24th day of July, 1903, there was entered of record in the office of the clerk of said Court, in said cause, an order granting leave to strike out certain parts of answer, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MARIA SANDOVAL
vs.
GEORGE F. ALBRIGHT.

32 On motion, the defendant is hereby given leave to strike from his answer the following words, "in effect a new office" to which the plaintiff duly excepts.

Thereupon the cause came on for hearing by the Court, and upon the completion of argument by counsel, the Court takes the matter under advisement.

And thereafter, on to-wit, the 3rd day of August, 1903, there was entered of record in the office of the Clerk of said Court, in said cause, an order overruling the demurrer to answer, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO *ex Rel.* JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the information, and the Answer of the Respondent and the Demurrer filed thereto, the court having heard counsel for the respective parties, Neill B. Field appearing for the Territory and W. B. Childers appearing for the Respondent, and being fully advised in the premises the said demurrer is overruled; and whereupon the territor- and the relator announce

that they will not plead further, it is ordered by the court, the demurrer admitting the truth of the allegations contained in the answer, and that the Territory and Relator take nothing by their Writ, and that the said Respondent be and he is entitled to hold the office of assessor of Bernalillo county, and that the said writ be dismissed and that the Respondent have and recover his costs in this behalf expended, to be taxed, and that execution issue therefor.

(Endorsed: Filed in my office this August 3rd, 1903. W. E. Daine, Clerk.)

And thereafter, on to-wit, the 19th day of October, 1904,
33 there was filed in the office of the clerk of the District Court a
Mandate from the Supreme Court of the Territory of New
Mexico, which said Mandate is in words and figures as follows:

Territory of New Mexico to the District Court sitting within and for
the County of Bernalillo in the Second Judicial District, Greeting:

Whereas, In a certain cause lately pending before you, wherein the
Territory of New Mexico, *ex rel.* Jesus Ma. Sandoval was plaintiff
and George F. Albright was defendant, by your consideration in that
behalf, judgment was entered against the said plaintiff; and

Whereas, The said cause and judgment were afterwards brought
into our Supreme Court for review by appeal, whereupon such pro-
ceedings were had in said Supreme Court that at the January, 1904,
term thereof, on the twenty-fourth day of said term, the same being
September 13th, 1904, it was considered that the judgment aforesaid,
by you in form given, be reversed, and that the said cause be re-
manded to you with directions to re-instate this cause and proceed
in accordance with the views expressed in the opinion of the Court on
file.

Now, therefore, you are hereby commanded to re-instate said cause
upon your docket and proceed in accordance with the views expressed
in the opinion of the Court on file.

Witness, the Honorable Williams J. Mills, Chief Justice of the
Supreme Court of the Territory of New Mexico, and the seal of said
Court, this 17th day of October, 1904.

JOSE D. SENA, *Clerk.*

(Endorsed: Filed in my office this October 19, 1904. W. E.
Daine, Clerk.)

And thereafter, on to-wit, the 25th day of October, there was en-
tered of record in said cause an order re-instating the same
34 upon the docket of the Second Judicial District Court for
Bernalillo county, which said order is in words and figures as
follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court,

No. 6395.

TERRITORY OF NEW MEXICO *vs Rel.* JESUS MARIA SANDOVAL
vs,
 GEORGE F. ALBRIGHT.

Now on this 24th day of October, 1904, this cause came on to be heard: N. B. Field appearing for Jesus Maria Sandoval, the relator; E. L. Medler for the respondent, George F. Albright. The relator moved the Court to enter final judgment of ouster in said cause and for costs against the respondent; which motion was overruled. Relator excepts.

Thereupon the Court ordered that this cause be re-instated on the docket and that the judgment hereinbefore entered in favor of the respondent Albright be, and the same is, hereby vacated, set aside, and held for naught.

It is further ordered that the demurrer of the relator to the answer of the respondent is hereby sustained; to which the respondent excepts. Respondent Albright given leave to file an amended answer on or before the 5th day of November, 1904.

(Signed)

B. S. BAKER, *Judge.*

And thereafter, on to-wit, the 5th day of November, 1904, there was filed in the office of the clerk of said Court an Amended Answer; which said amended answer is in words and figures as follows, to-wit:

35 TERRITORY OF NEW MEXICO,
County of Bernalillo:

In the District Court,

TERRITORY *vs Rel.* JESUS MARIA SANDOVAL, Relator,
vs,
 GEORGE F. ALBRIGHT, Respondent.

Amended Answer.

Now comes George F. Albright, respondent in the above entitled cause, and by leave of the Court, files herein his Amended Answer to the Information filed against him, and says:

1. That he admits that at the general election held in the Territory of New Mexico on the fourth day of November, A. D. 1902, Jesus Maria Sandoval was duly elected to the office of assessor of the County of Bernalillo and received from the proper officers of said county a certificate of his election to said office; that thereafter and

within the time prescribed by law, the said Jesus Maria Sandoval duly qualified and entered upon the discharge of the duties of said office of assessor as aforesaid; but respondent denies that the said Jesus Maria Sandoval has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office and denies that the said Jesus Maria Sandoval is at the present time so qualified or has been so qualified since the tenth day of March, A. D. 1903.

2. Further answering the respondent says that he has no information as to whether or not the said Jesus Maria Sandoval has resigned his said office, but he denies that the said office did not become vacant and was not vacated by the said Jesus Maria Sandoval. Respondent admits that the term for which the said Jesus Maria

36 Sandoval was elected has not expired, that is to say, this respondent alleges that the said Jesus Maria Sandoval was elected to fill the office of assessor of the County of Bernalillo for the term beginning the first day of January, A. D. 1903, and the said term being for two years from said date; but this respondent alleges that the said office became vacant on the tenth day of March, A. D. 1903, in the manner hereinafter alleged.

3. This respondent further answering, alleges that on the 23rd day of March, 1903, this respondent was lawfully appointed to said office as hereinafter alleged, and further alleges that the said office was vacant at the time he was so lawfully appointed, and denies that the said Jesus Maria Sandoval was in possession of the said office, engaged in the discharge of the duties thereof, and further answering, denies that by stealth and fraud and without authority of law did unlawfully usurp the said office and did unlawfully take possession of the room assigned for the use of the assessor of Bernalillo county in the court house of said county, and the books, papers and other insignia of said office. Respondent alleges that after having been duly appointed and qualified as assessor by filing his bond and oath of office as required by law, on the day aforesaid, he demanded possession of the office and said books and papers from one Jesus Garcia, who was then the only person in actual possession of the same, he, the said Jesus Garcia, having been a deputy under the said Jesus Maria Sandoval and being then and there his representative in possession of the said office, books and papers, and that he, the said Jesus Garcia, so representing the said Jesus Maria Sandoval, peacefully surrendered possession of the said room and said books, papers and other insignia of office to this defendant without objection; and that at the time that he demanded the possession of the said

37 office, books and papers from the said Garcia he presented to him an order from the County Commissioners of the said County of Bernalillo, directed to the said Jesus Maria Sandoval, commanding him, the said Sandoval to deliver the said office, books and papers and insignia of office to this respondent.

4. Further answering this respondent admits that he has ever since assumed to be the Assessor of Bernalillo County and alleges that he is the lawful Assessor of said county, and denies that by any unlawful usurpation and intrusion he has become possessed of the said

office of Assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico, as alleged in said information, and alleges that he is the lawful incumbent thereof and entitled to the emoluments, immunities and privileges appertaining and belonging to the same.

5. For answer to the second cause of action in said information alleged, this respondent says that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed Assessor of the County of Bernalillo, and duly qualified as such as aforesaid by filing his bond and oath of office, by the Board of County Commissioners of Bernalillo County, acting under and by virtue of section 3 of an act of the Legislative Assembly of the Territory of New Mexico, entitled "An Act to create the County of Sandoval, approved March 10, 1903," and as amended by an act entitled "An Act to amend section 3 of an act entitled 'An Act to create the County of Sandoval,' " approved March 12, 1903; and this respondent, further answering,

38 denies that the said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person than the said Jesus Maria Sandoval to be Assessor of the County of Bernalillo aforesaid for the unexpired part of the term for which the said Jesus Maria Sandoval had been theretofore elected by the qualified electors of Bernalillo County, as in the first count of said information set forth; and denies that the said act in said particulars is void in law because the said legislation attempts to deprive the said Jesus Maria Sandoval of his right to said office for the full term for which he was elected without due process of law and to deprive the said Jesus Maria Sandoval of the equal protection of law, and is therefore in contravention of the provisions of the Constitution of the United States and in that the said legislation is a special law regulating County affairs and granting special privileges to the Board of County Commissioners of Bernalillo County and is in contravention of the legislation of Congress and not within the grant of legislative power granted by Congress to the Territorial Legislature, in that the same is not, in so far as it attempts to deprive the said Jesus Maria Sandoval of the office of Assessor of Bernalillo County for a portion of the term for which he was elected, a rightful subject of legislation by said Territorial Legislature, but respondent alleges that the said legislation is valid in every particular and fully authorized and empowered the County Commissioners to appoint this respondent to said office.

6. Further answering, this respondent alleges that the office of Assessor of the County of Bernalillo became and was vacant by reason of said legislation and creation of the County of Sandoval, it having been previously a part of the County of Bernalillo; said legislation being for the purpose of dividing the County of Bernalillo and creating the County of Sandoval; that the Legislative Assembly, together with the Governor of the said Territory, had full power and authority to pass said acts and every part

thereof, and thereby vest in the County Commissioners of Bernalillo County the power to appoint this respondent, or such other person as they saw fit to select, to the office of Assessor for the new County of Bernalillo, as the same existed from and after the date of the passage of said acts. Respondent further alleges that the office was subject to the control of the Legislative Assembly and the Governor of the Territory of New Mexico, legislating under the provisions of the Organic Act, and that a vacancy thereby was created by said acts above referred to.

7. Further answering, as to both of the said causes of action set up in the said information, this respondent alleges that by virtue of said act entitled "An Act to create the County of Sandoval, approved March 10, 1903," and the act to amend the said act, approved March 12, 1903, there was created the County of Sandoval in the Territory of New Mexico, and that the said relator at the time of the creation of the said County of Sandoval by said acts, was and had been for a long time and many years previous thereto a resident of the portion of Bernalillo County which was incorporated into and made the County of Sandoval, and that by virtue of the passage of the said acts the said relator became and was, and still is, a resident of the said County of Sandoval and not of the County of Bernalillo. Thereupon the said relator ceased to be upon the passage of said acts a resident of the County of Bernalillo as constituted after the passage of the same, and was disqualified from exercising the duties of the office of Assessor of the said County of Bernalillo as so constituted, and at the time of the appointment and qualification of this respondent as such Assessor by the Board of County Commissioners of the said County of Bernalillo as newly constituted under the said acts of the Legislative Assembly, as alleged in said information, the said relator was a resident, as aforesaid, of that portion of the original County of Bernalillo which became and was a part of the newly created County of Sandoval, and continued to be such a resident, and still continues to be such a resident, and had not removed into that portion of the original County of Bernalillo which constituted the new County of Bernalillo after the passage of the said acts, and now constitutes the same. Respondent further alleges that the said relator always had been a resident of the territory now constituting the said County of Sandoval, prior to the passage of the said acts as aforesaid, and has ever since been a resident of the same, and had not removed into the territory constituting the County of Bernalillo after the passage of the said acts and now constituting the same, nor has he removed into the same up to this time. And respondent alleges that the office of Assessor of the said County of Bernalillo as constituted by the passage of the said acts, became vacant, and would have become vacant by reason of the facts hereinbefore last above alleged, even if the said acts had not declared the said office vacant, and respondent denies that the said relator is entitled or qualified to hold the office of Assessor of the said County of Bernalillo as newly constituted, and can have any judgment in this cause entitling him to the possession of the said office; and the said respondent denies that he holds the

said office and assumes to discharge the duties thereof wrongfully and contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico.

W. B. CHILDERS,
Attorney for Respondent.

41 TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

George F. Albright, being duly sworn, on oath deposes and says that he is the respondent in the above entitled cause; that he has read the foregoing amended answer and knows the contents thereof, and that the matters and things contained therein are true.

GEORGE F. ALBRIGHT.

Subscribed and sworn to before me this 4th day of November, A. D. 1904.

[SEAL.]

E. L. MEDLER,
Notary Public.

And thereafter, on the 7th day of November, there was filed in the office of the Clerk of the said Court by the relator, a motion for judgment on the pleadings, which said motion is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

No. 6395.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS M. SANDOVAL, Relator,
vs.

GEORGE F. ALBRIGHT, Respondent.

Motion for Judgment on the Pleadings.

Comes now the relator, by his attorney, and moves the Court for judgment on the pleadings in this cause, and for cause of said motion shows to the Court the following, that is to say:

I.

Because the amended answer filed herein by the respondent is frivolous and contains no material allegation not contained in the original answer.

42 II.

Because the defense attempted to be set up in the said amended answer is *ex judicio*, and the said respondent seeks, by the said amendment, to obtain a reconsideration in this Court of matters

which have already been adjudicated adversely to the respondent by the Supreme Court of this Territory in this cause.

III.

Because it affirmatively appears from the allegations of the said amended answer that the relator is entitled to the said office of Assessor of Bernalillo County, and that the respondent has no lawful right thereto,

IV.

Because the said amended answer does not state facts showing that respondent is entitled to hold the office of Assessor of Bernalillo County, and is otherwise insufficient in law to constitute a defense to this action.

Wherefore relator prays the Court to enter a judgment of ouster against the respondent and for costs, notwithstanding the said answer.

NEILL B. FIELD,

Attorney for the Relator.

Endorsed: "Filed in my office this Nov. 7, 1904. W. E. Dame, Clerk."

And thereafter on, to-wit, the 19th day of November, 1904, there was entered in record in said cause objections of the respondent to the entry of certain parts of the judgment proposed to be rendered in said cause, which said objections are in words and figures as follows, to-wit:

43 TERRITORY OF NEW MEXICO, *County of Bernalillo*:

In the District Court.

TERRITORY *ex Rel* JESUS M. SANDOVAL

vs.

GEORGE F. ALBRIGHT, Respondent.

To so much of the judgment in said cause as is proposed to be rendered and as is rendered, as reads as follows:

"That the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of Assessor of the County of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of Assessor of the County of Bernalillo and Territory of New Mexico as the lawful custodian thereof."

Counsel for respondent objects, upon the ground that it is not a proper part of a judgment to be rendered in said cause, and is not supported by the pleadings or the mandate of the Supreme Court, or the action of the Court in sustaining the motion treated as a des-

murrer in said cause to the amended answer of the respondent filed therein: Which objection the Court overrules, and to its action in overruling the same the respondent by his counsel excepts.

And thereupon, upon the said 19th day of November, 1904, there was entered of record in said cause a Final Judgment, which said Judgment is in words and figures as follows, to-wit:

44 TERRITORY OF NEW MEXICO, *County of Bernalillo*:

In the District Court,

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MARIA SANDOVAL,
Relator,

vs.

GEORGE F. ALBRIGHT, Respondent.

This day this cause coming on to be heard, upon the motion of the relator for judgment upon the pleadings, and the Court having read the same, and being fully advised in the premises, said motion is by the Court sustained, as to the third and fourth paragraphs thereof.

Wherefore it is considered, ordered, adjudged and decreed by the Court that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of Assessor of the County of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of Assessor of the County of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of Assessor of the County of Bernalillo and Territory of New Mexico as the lawful custodian thereof.

It is further considered, ordered, adjudged and decreed by the Court that the relator, Jesus Maria Sandoval, do have and recover of and from the respondent, George F. Albright, his costs in this behalf expended, to be taxed, and may have execution therefor.

45 To the rendition of the foregoing judgment the respondent hereby excepts and prays the Court to grant him an appeal and to fix the amount of a bond for supersedeas and to grant him a supersedeas upon filing proper bond in accordance with the amount so fixed, to be approved by the Court; which prayer for an appeal and for the fixing and acceptance of a supersedeas bond the Court denies; and to which action of the Court denying the same the respondent, by his counsel, excepts.

B. S. BAKER, *Judge*.

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

I, W. E. Dame, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in obedience to the Writ of Error hereinbefore set forth, do hereby certify unto the Supreme Court of the Territory of New Mexico the above and foregoing as a true, correct and complete transcript and copy of so much of the record and proceedings had in the cause lately pending in said Court for the County of Bernalillo, wherein the Territory of New Mexico *et al.*, were plaintiffs and George F. Albright was defendant, as same appears of record in my office, and as I was by said Writ commanded to do.

In witness whereof I have herunto set my hand and affixed the seal of said Court on this 17th day of December, 1901.

[SEAL.]

W. E. DAME, *Clerk*.

15 *And Thereafter*, on to-wit, the 3rd day of December, 1906, there was entered of record in the office of the clerk of said court, in said cause, the Final Judgment; which said final judgment is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO—

Bernalillo District Court,

No. 7241.

JESUS M. SANDOVAL, Plaintiff,

vs.

GEORGE F. ALBRIGHT, Defendant.

Final Judgment.

This day came the defendant by his attorney, and by leave of the court filed herein an amended answer, and thereupon the plaintiff by his attorney renews the motion for judgment on the pleadings in this cause, and the court having seen said motion and being now fully advised, *doth order*, that the same be granted.

Wherefore it is Considered, Ordered and Adjudged by the Court that the plaintiff Jesus M. Sandoval do have and recover of and from the defendant George F. Albright the sum of one thousand six hundred and eighty-eight dollars and eighty-four cents, (\$1,688.84), with interest thereon at the rate of six per cent. per annum from the third day of December, 1903, until paid, together with his costs in that behalf expended, to be taxed, and may have execution therefor.

IRA A. ABBOTT, *Judge*.

(Endorsed): Filed in my office this Dec. 3, 1906. John Venable, Clerk.

47 *And Thereafter*, on to-wit, the 5th day of December, 1906, there was filed in the office of the clerk of said court, in said cause, defendant's motion to set aside judgment; which said motion is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo;

In the District Court,

No. 7241.

JESUS M. SANDOVAL

vs.

GEORGE F. ALBRIGHT,

Motion.

Now comes the defendant in the above entitled cause and moves the court to set aside the judgment heretofore rendered in said cause upon the plaintiff's motion for judgment based upon the pleadings, and grant him a trial of said cause, and for ground of said motion, defendant alleges that plaintiff is not entitled to judgment upon the admissions made in the pleadings in said cause and the said admissions do not sustain the judgment rendered by the court therein.

W. B. CHILDERS,

Attorney for Defendant.

(Endorsed:) "Filed in my office this Dec. 5, 1906. John Venable, Clerk."

Be it remembered that heretofore, on to-wit, the 18th day of December, 1906, there was entered in the office of the clerk of said court, in said cause, an order denying motion of defendant to set aside judgment; which said order is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo;

In the District Court,

No. 7241.

J. M. SANDOVAL

vs.

GEO. F. ALBRIGHT,

18 The motion by the defendant to set aside the judgment heretofore rendered against him is heard and denied.

IRA A. ABBOTT, *Judge.*

December 18, 1906.

And Thereafter on to-wit, the 8th day February, 1907, there was entered of record in the office of the clerk of said court, in said cause, an order of the court granting an appeal to the Supreme Court of the Territory; which said order is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo;

In the District Court,

No. 7241.

JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

Order Granting Appeal.

This cause coming on to be heard on the motion of defendant praying that the court grant him an appeal to the Supreme Court of the Territory from the final judgment entered herein, and the plaintiff being present in open court by his attorney,

It is Ordered, Adjudged and Decreed that the said appeal be and the same is hereby granted upon defendant filing a good and sufficient bond as required by law, to be approved by the court, and that said judgment be superseded to the termination of such cause in said Supreme Court upon said appeal.

IRA A. ABBOTT, *Judge.*

(Endorsed:) "Filed in my office this Feb. 8, 1907. John Venable, Clerk."

49 *And Thereafter*, on to-wit, the 8th day of February, 1907, there was filed in the office of the clerk of the said court, in said cause, a supersedeas bond; which said supersedeas bond is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo;

In the District Court,

No. 7241.

JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

Know all men by these presents, that we, Geo. F. Albright, as principal, and W. H. Gillenwater and Frank A. Hubbell as sureties, are held and firmly bound unto Jesus M. Sandoval in the penal sum

of \$3,380.00, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Signed, sealed and dated this 4th day of February, A. D. 1907.

The condition of the foregoing obligation is such that whereas on to-wit the 3rd day of December, 1906, in the District Court of the Second Judicial District of the Territory of New Mexico, for the County of Bernalillo, the said Jesus M. Sandoval recovered a judgment against the said George F. Albright for the sum of \$1,688.84 damages, and costs, and whereas the said George F. Albright as such defendant has prayed for and obtained an appeal from said judgment to the Supreme Court of the Territory of New Mexico;

Now, Therefore, if the said George F. Albright, shall prosecute his said appeal to effect and abide by and pay the judgment and all costs which may be rendered or affirmed against him, then the
50 above obligation to be null and void; otherwise to be and remain in full force and effect.

GEO. F. ALBRIGHT,	[SEAL.]
W. H. GILLENWATER,	[SEAL.]
F. A. HUBBELL,	[SEAL.]

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

On this 4th day of February, A. D. 1907, before me personally appeared Geo. F. Albright, principal, and W. H. Gillenwater and Frank A. Hubbell, sureties upon the above and foregoing bond, and they each acknowledged to me that they executed the same as their free act and deed.

And the said W. H. Gillenwater and Frank A. Hubbell, sureties upon said bond, being by me each severally sworn, did say, each for himself and not one for the other, that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities and property exempt from execution and forced sale.

W. H. GILLENWATER,	\$1690.00,
FRANK A. HUBBELL,	\$1690.00,

Subscribed and sworn to before me and in witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[NOTARIAL SEAL.]

THOS. K. D. MADDISON,
Notary Public.

The above and foregoing bond as to form and sufficiency
51 approved by me this 8th day of February, 1907.

IRA A. ABBOTT, *Judge.*

(Endorsed:) "Filed in my office this Feb. 8, 1907. John Venable, Clerk."

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

I, John Venable, Clerk of the District Court of the Second Judicial District, Territory of New Mexico, within and for the County of Bernalillo, hereby certify the above and foregoing to be a true, correct and complete transcript of the record and proceedings in a cause lately pending in this court wherein J. M. Sandoval was the plaintiff and Geo. F. Albright was the defendant, as same remain of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 21st day of February, 1907.

[COURT SEAL.]

JOHN VENABLE, *Clerk.*

52 And afterward, on towit, *on* the twelfth day of August,

A. D. 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico an assignment of errors in the said Supreme Court which said assignment of errors was and is as follows to wit:

No. 1204.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Assignment of Errors.

Now comes the appellant in the above entitled cause and assigns as error the following:

1. The court erred in sustaining the motion of appellee for judgment on the pleadings.

2. The court erred in holding that appellant and defendant was responsible to the appellee and plaintiff for any moneys received as the incumbent of said office.

3. The court erred in holding that the complaint stated facts sufficient to constitute a cause of action against the appellant.

4. The court erred in holding that the plaintiff was qualified to hold said office and was therefore entitled to receive the fees and emoluments thereof.

5. The court erred in holding that the appellant was not the lawful incumbent of said office.

6. The court erred in holding that said office was not vacant by reason of the legislation referred to in paragraphs 5, 6 and 7 of the answer to said complaint.

7. The court erred in overruling defendant's motion to set aside the judgment and grant him a trial of said cause.

8. The court erred in rendering judgment for the plaintiff.

53 Wherefore appellant prays that the judgment below in this cause be reversed and set aside.

W. B. CHILDERS,

Attorney for Appellant.

Which said assignment of errors was and is endorsed on the back thereof as follows to wit: No. 1204—Supreme Court, Territory of New Mexico—Jesus M. Sandoval, appellee, *vs.* George F. Albright, appellant—Assignment of errors.—Filed in my office this Aug. 21, 1907, Jose D. Sena, Clerk.—W. B. Childers, Attorney for appellant.

And Heretofore, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government on the first Wednesday after the first Monday in January, on the tenth day thereof, the same being the 25th day of February A. D., 1908, the following among other proceedings were had and entered of record, as follows to wit:

No. 1204.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Pope, Chief Justice Mills, and Associate Justices Parker, McFie and Mann concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the district Court in and for the county of Bernalillo whence this cause came into this court

be and the same hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court that the appellee Jesus M. Sandoval do have and recover of and from the appellant George F. Albright the sum of One Thousand eight hundred and thirteen 25/100 (\$1813.25) dollars, with interest at the rate of six per cent. per annum from date until paid, together with costs in this behalf expended for which let execution issue:

It is further considered and adjudged by the court that Jesus M. Sandoval, do have and recover of and from W. H. Gillenwater and Frank A. Hubbell, sureties on the supersedeas bond in the above entitled cause, the sum of One Thousand Eight Hundred and Thirteen 25/100 (\$1813.25) dollars together with costs of suit for which let execution issue.

And afterwards, on to wit on the seventh day of the said regular term the same being the 26th day of February, A. D. 1908, the following among other proceedings were had and entered of record following to wit:

No. 1204.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on before the court upon the motion of appellant for further time within which to file motion for rehearing, and the court being sufficiently advised in the premises, grants the said motion. It is therefore considered and adjudged and decreed by the court that the appellant herein do have twenty days from this date within which time to file motion for rehearing herein.

And Afterwards, on to wit, the twenty ninth day of February, A. D., 1908, there was filed in the office of the Supreme Court of the Territory of New Mexico, a motion and order for appeal to the Supreme Court of the United States, which said motion and order for appeal was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1204.

JESUS M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Motion for Allowance of Appeal and Supersedeas.

Now comes the appellant in the above entitled cause, by his Attorney W. B. Childers, and prays the court to grant him an appeal from the judgment and Decree of this court, rendered in the above cause on the 25th day of February, A. D., 1908, to the Supreme Court of the United States and allow a Supersedeas, and that a transcript of the record and proceedings in said cause may be sent to the Supreme Court of the United States as provided by law.

Appellant files herewith Assignment of errors in said cause.

Dated this 28th day of February A. D., 1908.

W. B. CHILDERS,

*Attorney for Appellant.**Order Allowing Appeal and Supersedeas.*

This cause coming on to be heard upon the above petition of the Appellant, it is ordered and Decreed that the said Appellant, he and he is hereby granted an appeal from the judgment and Decree of this

Court in the above entitled cause to the Supreme Court of the United States, and is granted a supersedeas upon filing a proper bond.

WILLIAM J. MILLS,

*Chief Justice Supreme Court of
the Territory of New Mexico.*

56 Which said motion and order granting appeal and for supersedeas was and is indorsed on the back thereof, as follows to wit: No. 1204—In the Supreme Court of the Territory of New Mexico.—Jesus Ma Sandoval, Appellee, *vs.* George F. Albright, appellant.—Motion for Allowance of Appeal and Supersedeas—Order allowing appeal and Supersedeas—W. B. Childers, Attorney for appellant—Filed in my office this 29th day of Feb. 1908, Jose D. —, Clerk.

And Afterwards on to wit, on the 29th day of February, A. D., 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on appeal to the Supreme Court of the United States which said assignment of errors was and is in words following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1204.

JESUS MA. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Assignment of Errors.

Appellant files the following assignment of errors as part of the record in said cause to be transmitted to the Supreme Court of the United States:

The Supreme Court of the Territory of New Mexico erred in sustaining the following errors committed by the District Court from which said cause was appealed to said Supreme Court of the Territory:

1. The court erred in sustaining the motion of appellee for judgment on the pleadings.

2. The court erred in holding that appellant and defendant was responsible to the appellee and plaintiff for any moneys received as the incumbent of said office.

57 3. The court erred in holding that the complaint stated facts sufficient to constitute a cause of action against the appellant.

4. The court erred in holding that the plaintiff was qualified to hold said office and was therefore entitled to receive the fees and emoluments thereof.

5. The court erred in holding that the appellant was not the lawful incumbent of said office.

6. The court erred in holding that said office was not vacant by reason of the legislation referred to in paragraphs 5, 6 and 7 of the answer to said complaint.

7. The court erred in overruling defendant's motion to set aside the judgment and grant him a trial of said cause.

8. The court erred in rendering judgment for the plaintiff and appellee.

W. B. CHILDERS,

Attorney for Appellant.

Which said assignment of errors was and is endorsed on the back thereof, as follows to wit: No. 1201.—In the Supreme Court of the Territory of New Mexico.—Jesus Maria Sandoval, appellee, *vs.* George F. Albright, appellant.—Assignment of errors.—Filed in my office this Feb 29, 1908, Jose D. Senn, Clerk.—W. B. Childers Attorney for appellant.

And Afterwards, on to wit, on the 29th day of February A. D., 1908, there was filed in the office of the clerk of the said Supreme Court of the Territory of New Mexico, a supersedeas Bond which said supersedeas bond was and is in words following to wit:

In the Supreme Court of the Territory of New Mexico,

No. 1201,

JESUS MA SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

58 *Supersedeas Bond.*

Know all men by these presents, that George F. Albright, as principal, and Frank A. Hubbell and W. H. Gillenwater, as his sureties, are held and firmly bound unto Jesus Maria Sandoval in the sum of \$3,450.00, lawful money of the United States, to be paid to the above named obligee, his assigns, administrators and executors, for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators and executors jointly and severally, by these Presents. Sealed with our Seals this 28th day of February A. D., One Thousand, nine Hundred and eight.

The condition of the foregoing obligation is such that, Whereas the above named Jesus Maria Sandoval, obtained a judgment on the 25th day of February 1908, for the sum of \$1813.25, together with costs of suit, and

Whereas, the said Albright prayed for an appeal from the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States,

Now, Therefore, the condition of the foregoing obligation is such

that, if the above named Appellant shall prosecute his appeal to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

	GEORGE F. ALBRIGHT.	[SEAL.]
Sureties	{ FRANK A. HUBBELL.	[SEAL.]
	{ W. H. GILLINWATER.	[SEAL.]

TERRITORY OF NEW MEXICO,

County of Bernalillo, ss:

February 28th, 1908, before me, the undersigned, Notary Public, personally appeared George F. Albright, Principal, and Frank A. Hubbell, and W. H. Gillenwater, Sureties on said bond, to me known to be the same persons described in and who executed the foregoing instrument of writing and they acknowledged that they executed the same as their free act and deed.

And the said Frank A. Hubbell, and W. H. Gillenwater, sureties upon said bond, being by me each severally sworn, did say each for himself and not one for the other that he is worth the amount set opposite his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities and the amount by law exempt from execution and force sale.

Frank A. Hubbell	\$2,000.00
W. H. Hillenwater	\$2,000.00

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written this 28th day of February, 1908.

[SEAL.]

THOS. K. D. MADDISON,

Notary Public.

This Bond as to form and sufficiency is approved by me this 2nd day of March, A. D., 1908.

WILLIAM J. MILLS,

Chief Justice.

Las Vegas, N. M.

Which said supersedeas bond was endorsed on the back thereof as follows to wit No. 1204—In the Supreme Court of the Territory of New Mexico,—Jesus Ma Sandoval, appellee, *vs.* George F. Albright appellant—Supersedeas Bond—W. B. Childers, Attorney for appellant,—Filed in my office this Feb. 29, 1908, Jose D. Sena Clerk.

And Afterwards, on to wit in Vacation on the 2nd day of March, A. D., 1908 there was entered of record among other things the following order to wit:—

60

No. 1204.

JESUS MA. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

This cause coming on to be heard upon the above petition of the Appellant, it is Ordered and Decreed that the said appellant be and he is hereby granted an Appeal from the Judgment and Decree of this Court in the above entitled cause, to the Supreme Court of the United States, and is granted a Supersedeas upon filing of a proper bond.

WILLIAM J. MILLS,

*Chief Justice Supreme Court of
the Territory of New Mexico.*

Las Vegas, March 2nd, 1908.

And Afterwards, on to wit, in vacation, on the 2nd day of March, A. D., 1908, the following among other proceedings were had and entered of record, following to wit:

No. 1204.

JESUS MA. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Whereas, on the 25th day of February, A. D., 1908, in cause No. 1204, entitled Jesus Ma Sandoval, appellee, *vs.* George F. Albright Appellant, lately pending in this court, judgment was rendered in said court in favor of said plaintiff and appellee, and against the said defendant and appellant for the sum of \$1,813.25 and all costs in that behalf expended, and

Whereas, an appeal to the Supreme Court of the United States of America, has this date been granted from this Court to the Supreme Court of the United States of America, and

61 Whereas, a supersedeas bond in the sum of \$3,650, with two good and sufficient sureties thereon, has been filed in the office of the Clerk of this Court, and the said supersedeas bond has been duly approved both as to form and sufficiency of sureties thereon.

Therefore, It is ordered by the court that all further proceeding tending to the enforcement and collection of the said judgment be and the same hereby are superseded and suspended, pending the determination of the said appeal herein granted, by the Supreme Court of the United States.

WILLIAM J. MILLS,

Chief Justice, Supreme Court of New Mexico, etc.

Las Vegas, N. M., March 2nd, 1908.

And Afterwards, on to wit: on the 25th day of February A. D. 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico an opinion by the Court in the above entitled cause, which said opinion by the court was and is in the following words and figures, following to wit:

62 In the Supreme Court of the Territory of New Mexico,
January Term, A. D. 1908.

No. 1204.

J. M. SANDOVAL, Appellee,

vs.

GEORGE F. ALBRIGHT, Appellant.

Appeal from District Court, Bernalillo County.

Syllabus.

The judgment of the District Court is affirmed upon the authority of Territory *vs.* Albright, 12 N. M., 293, and Sandoval *v.* Albright decided by this Court on January 13th, 1908.

Statement of the Facts.

This suit was brought by Sandoval, claiming to be the lawful incumbent of the office of Assessor of Bernalillo County, to recover from the defendant Albright, the sum of \$1,561.88, alleged to have been received by defendant from the Territorial auditor on July 25, 1905, as a part of the fees and emoluments of the office of assessor. The answer of the defendant admitted the receipt of the money but alleged, *first*, that defendant was the lawful incumbent of the office by virtue of an appointment of the Board of County Commissioners of Bernalillo County, in filling a vacancy resulting from the act affecting the creation of Sandoval County, approved respectively March 10, 1903 and March 12, 1903, and, *second*, that plaintiff was disqualified from exercising the duties of the office because at the time a resident of Sandoval County. Thereupon plaintiff moved for judgment on the pleadings, which being sustained, defendant prosecutes his appeal to this court.

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Opinion of the Court.

POPE, J. (after stating the facts):

This is one of the fragments of a litigation which has been before this Court, in one form or another at almost every term, since 1904. The case at bar presents no features that have not been already fully considered and decided by this Court. The power of the County Commissioners to appoint Albright to the office of assessor was de-

cided adversely to him, in *Territory v. Albright*, 78 Pac. 201, 12, N. M., 293. The eligibility of Sandoval to hold office was decided favorably to Sandoval in the same case. The right of Sandoval, under these conditions, to recover the fees of the office, was settled in his favor, by the decision of this Court in *Sandoval v. Albright*, No. 1190, decided January 13, 1908.

The Judgment is accordingly affirmed.

WM. H. POPE,

Associate Justice.

We Concur:

WILLIAM J. MILLS, *C. J.*

FRANK W. PARKER, *J. J.*

JOHN R. McFIE, *J. J.*

EDWARD A. MANN, *J. J.*

Associate Justice Abbott, having tried the case below, took no part in this decision.

64 TERRITORY OF NEW MEXICO, *Supreme Court, ss:*

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico do hereby certify that the above and foregoing sixty-three pages contain a full, true, complete and perfect copy of the record and proceedings, pleadings and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an appeal heretofore granted herein.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 5th day of March, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,

Clerk Supreme Court of N. M.

65 The United States of America to Jesus Maria Sandoval,
Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., within sixty days from the date hereof, pursuant to an appeal, granted from the Supreme Court of the Territory of New Mexico, to the Supreme Court of the United States of America, in a certain cause Numbered 1201, wherein George F. Albright was appellant, and you were appellee, to show cause, if any there be why the judgment of the said Supreme Court, rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this the 2nd day of March A. D. 1908.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM J. MILLS,

Chief Justice of the Supreme Court,

Territory of New Mexico.

ALBUQUERQUE, N. M., *March 9, 1908.*

I acknowledge service of above order granting appeal and also of the order allowing supersedeas; this 9th day of March, 1908.

J. M. SANDOVAL,
By NEILL B. FIELD,
His Attorney.

Endorsed on cover: File No. 21,099. New Mexico Territory Supreme Court. Term No. 336. George F. Albright, appellant, *vs.* Jesus Maria Sandoval. Filed April 8th, 1908. File No. 21,099.





Office Supreme Court, U. S.

FILED.

DEC 7 1909

JAMES H. MCKENNEY,

CLERK.

No. 116 and 117, and No. 336 (Oct. Term 1908.)

IN THE

Supreme Court of the United States,

OCTOBER TERM. 1909.

No. 116.

GEORGE F. ALBRIGHT, *Plaintiff in Error*,

vs.

JESUS MARIA SANDOVAL.

No. 117.

JESUS MARIA SANDOVAL, *Plaintiff in Error*,

vs.

GEORGE F. ALBRIGHT.

No. 336. (Oct. Term. 1908.)

GEORGE F. ALBRIGHT, *Appellant*,

vs.

JESUS MARIA SANDOVAL.

In Error to and Appeal from the Supreme Court of the
Territory of New Mexico,

Brief of Plaintiff in Error in No. 116 and Ap-
pellant in No. 336 (October Term, 1908.)

E. L. MEDLER,

Attorney for Plaintiff in Error
George F. Albright.



IN THE
Supreme Court of the United States,
OCTOBER TERM, 1909.

No. 116.

GEORGE F. ALBRIGHT, *Plaintiff in Error,*

vs.

JESUS MARIA SANDOVAL.

No. 117.

JESUS MARIA SANDOVAL, *Plaintiff in Error,*

vs.

GEORGE F. ALBRIGHT.

No. 336. (Oct. Term, 1908.)

GEORGE F. ALBRIGHT, *Appellant,*

vs.

JESUS MARIA SANDOVAL.

STATEMENT OF THE CASE.

The cases numbered 116 and 117, October term, 1909, are an appeal and cross-appeal from a judgment of the Supreme Court of the Territory of New Mexico, rendered January 8, 1908, against the plaintiff in error, George F. Albright, for the sum of \$5,762.56, in favor of Jesus Maria Sandoval. (See page 59 of transcript.)

At the general election held for the election of county officers in the various counties in the

Territory of New Mexico in November, 1902, Jesus Maria Sandoval was duly elected assessor of Bernalillo County for the term of two years from the first day of January, 1903; he qualified as provided by law and upon the last named date assumed the duties of the office. While he was so holding the office, the Territorial Legislature of 1903, passed an Act creating the new County of Sandoval out of a portion of the old County of Bernalillo, said Act to take effect on the 14th day of April, 1903. Two of the members of the Board of County Commissioners, and Jesus Maria Sandoval the assessor of Bernalillo County, as it existed prior to the passage of the bill creating the new county of Sandoval, were, it is claimed, residents of that portion of Bernalillo County, which by virtue of that Act became, on and after April 14th, 1903, the County of Sandoval. The original act creating Sandoval County provided for an election to fill the vacancies in the offices of county commissioners and assessor thus created, and an amendment was afterwards passed and approved March 12th, 1903.

As the constitutionality of these acts, and the power of the Territorial Legislature to pass the same under the Act of Congress of July 30, 1886, and its amendment of July 19, 1888, commonly known as the "Springer Act", are involved in this case, as we contend, for the in-

formation of the Court we deem it proper to set out the Acts at length. The Acts of the Territorial Legislative Assembly of 1903, referred to are as follows:

Chapter 27: An Act to create the County of Sandoval, approved March 10, 1903.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

Section 1. That a county be and the same is hereby created and established in the Territory of New Mexico, to be known as the County of Sandoval, which shall include all that portion of the present County of Bernalillo lying north of a line beginning at the southeast corner of township 12 north, range 6 east of the New Mexico principal meridian, and running thence due west on the township line between townships 11 and 12 north, to the boundary line between the present County of Bernalillo and the County of Valencia.

Sec. 2. The county officers for the said County of Sandoval and their duties shall be the same as those prescribed by law for officers of other counties in the Territory of New Mexico, and they shall be elected at the same time and in the same manner as the officers of other counties in New Mexico. On or before the first day of April, 1903, the Governor of the Territory of New Mexico shall appoint three qualified persons who shall be legal voters within the limits of said County of Sandoval, as an election and returning board. The members of said returning board before entering upon the discharge of their duty shall take an oath before some officer duly qualified to administer the same, which oath shall be in writing, and after having executed the same, it shall be filed by the members

with the Secretary of the Territory, who shall thereupon send the said returning board registration lists, poll books and all other blanks which are sent by him to county commissioners of organized counties for the purpose of conducting elections therein. It shall be the duty of such returning board to appoint judges and clerks of election, and to call and give notice of the holding of a special election, to be held on the fourteenth day of April, 1903, and said persons so appointed shall have the same power and authority as to receiving, canvassing and certifying the returns of the said special election to be held on the said fourteenth day of April, 1903, as is now conferred by law upon the boards of county commissioners of the several counties of the Territory. Such members of such returning board shall serve as such without compensation and their functions shall cease with the election of a board of county commissioners of said County of Sandoval.

Sec. 3. On or before the first day of April, 1903, the county commissioners of the present County of Bernalillo shall give notice of an election to be held on the fourteenth day of April, 1903, within the County of Bernalillo as the same will be constituted after the passage of this act, for the election of two county commissioners, one probate judge and one assessor, to serve until their successors are elected and qualified at the next general election. Said officers so named in this section to be at the time of said election actual bona fide residents of the said County of Bernalillo as the same shall be constituted after the passage of this act. The returns of said election to be made as the returns of general elections are made.

Sec. 4. The registration lists of the last gen-

eral election held in the County of Bernalillo shall be used in the special elections in the Counties of Bernalillo and Sandoval, herein provided to be held.

Sec. 5. At said special election, to be held as hereinbefore provided, in the County of Sandoval, on the fourteenth day of April, 1903, there shall also be held an election for the selection of a county seat for said County of Sandoval, and upon the tickets used at said special election there shall be printed the words "For as county seat," and the place in the said County of Sandoval receiving the majority of said votes at said special election shall be and remain the county seat of said County of Sandoval.

Sec. 6. The county officers of the said County of Sandoval and their duties shall be the same as those prescribed by law for officers of other counties in the Territory of New Mexico, and they shall be elected at the same time and in the same manner as the officers of other counties in New Mexico. * * *

Sec. 6 then provides for an election and returning board, etc., for the holding of a special election for county officers of said County of Sandoval.

Sec. 7 makes Sandoval County a county of the third class and relates to the salaries of officers, etc.

Sec. 8 relates to the representation of the Counties of Sandoval and Bernalillo in the Territorial legislature.

Sec. 9 provides that Sandoval County shall be a part of the Second Judicial District and relates to the holding of terms of court, etc.

Sec. 10 relates to precincts and school districts in both counties and provides that they shall

remain as then constituted until changed as provided by law.

Sec. 11 relates to the ascertainment of the public debt of the old County of Bernalillo and its apportionment between the two new counties, etc.

Sec. 12 provides that for the purpose of enabling Sandoval County to pay to Bernalillo County its proportion of said debt as ascertained, the county is authorized and directed to issue coupon bonds, etc.

Sec. 13 provides that said bonds shall be sold for cash, at not less than par, and the proceeds turned over to Bernalillo County in settlement of said debt; that the bonds and coupons shall be turned over to Bernalillo County, etc.; provides for the annual levy of a tax to pay the interest on said bonds and to create a sinking fund; also provides that the debt due the County of Bernalillo shall bear interest at five per cent per annum until paid or satisfied, etc.

Sec. 14 provides that Sandoval County shall be entitled to all unpaid taxes due after June 1, 1903, upon property within the limits of the new county, and relates to their collection, etc.; also relates to the apportionment between the two counties of moneys received from licenses issued by Bernalillo County, in force in the new county of Sandoval, etc.

Sec. 15 provides that Sandoval County, until taxes could be levied and collected, may issue certain current expense bonds, and bonds for the purpose of erecting a suitable court house and jail, and relates to their form and the manner of issue and sale, etc.

Sec. 16. This act shall take effect and be in force on and after the fourteenth day of April, 1903, at which date or as soon thereafter as qual-

ified the first officers of said county elected at the special election of 1903, shall assume their respective duties and the said county shall be fully established as a county of the Territory of New Mexico, and the provisions herein contained providing for a returning board and its action in calling the election and canvassing the votes, and the method of ascertaining the debt of Sandoval County to Bernalillo County, shall take effect and be in force from and after the passage of this act.

The act amending the Sandoval County act, passed two days later, is as follows:

Chapter 49: An Act to amend section three of an Act entitled an Act to Create the County of Sandoval, approved March 10, 1903.

Approved March 12, 1903.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

Section 1. That section three of the act to create the County of Sandoval, approved March 10, 1903, be and the same is hereby amended so as to read as follows:

"Sec. 3. That T. C. Gutierrez, to fill the unexpired term of the second district, and Severo Sanchez, be and they are hereby appointed and constituted county commissioners for the County of Bernalillo as the same is constituted after the creation of Sandoval County, and the said T. C. Gutierrez and Severo Sanchez shall qualify as said county commissioners on or before the fifth day of April, A. D. 1903, and shall together with the county commissioner now in office for the said County of Bernalillo, hold a meeting not later than the tenth day of April, 1903, and said three persons as a board of county commissioners for Bernalillo County shall

appoint one assessor and one probate judge for the said County of Bernalillo to serve until their successors are elected and qualified at the next general election."

Sec. 2. On or before thirty days after said board of county commissioners of Bernalillo County has duly qualified as such commissioners, they shall assemble as a board of county commissioners and shall divide said County of Bernalillo into county commissioner districts.

Sec. 3. This act shall be in force and take effect from and after its passage.

On March 23rd, 1903, T. C. Gutierrez and Severo Sanchez, the persons named as county commissioners of Bernalillo County, together with the other county commissioner remaining in office, met and under the power vested in the board of county commissioners of Bernalillo County by Section 3 of the act last above quoted, appointed the plaintiff in error, George F. Albright, assessor of Bernalillo County as constituted after the passage of the above legislation, and he immediately qualified and took charge of the office and served until his successor was elected and qualified. The attorney general, on the relation of Sandoval, filed information in the nature of *quo warranto*, in the district court of Bernalillo County against Albright to try his title to the office of assessor, and a judgment of ouster was entered, and the judgment affirmed by the Supreme Court of New Mexico, (79 Pacific Rep. 719). An appeal in this proceeding was taken by Albright to

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this Court, which appeal on motion was dismissed, this court holding that:

"The liability to a fine on a judgment of ouster in *quo warranto* proceedings, or the possible effect of such judgment in subsequent litigation over the emoluments of the office, does not make the matter in dispute in the *quo warranto* proceedings after the term of office has expired measurable by some sum or value in money, and thus bring the judgment within the scope of the provisions of the act of March 3, 1885, (23 stat at Lg. 443, Chap. 335 U. S. Comp. Stat. 1901, p. 572), for appeals from the Territorial Supreme Courts to the Supreme Court of the United States." Quoting from syllabus.

See, Albright, appellant, vs. New Mexico ex rel Sandoral, 200 U. S. page 9-12.

Prior to dismissal of the appeal by this Court upon the *quo warranto* proceeding, and while the appeal from the District Court of Bernalillo County to the Supreme Court of the Territory was pending, in the *quo warranto* proceedings, the defendant in error, Jesus Maria Sandoval, on December 26, 1904, filed a suit against the plaintiff in error, George F. Albright, in the District Court of Bernalillo County, New Mexico, to recover \$6,184.16, alleged to be the lawful fees and emoluments received by Albright from March 27, 1903, to Nov. 19, 1904, pertain

ing to the office of assessor of Bernalillo County. In this suit a judgment was rendered against appellant Albright for \$5,360.53. An appeal was taken to the Supreme Court of the Territory and the judgment affirmed in that court, January 13, 1908. *Sandoval vs. Albright*, 93 *Pacific Reporter* 117. From this judgment of the Supreme Court of the Territory against Albright for \$5,360.53, in favor of Sandoval, a writ of error was sued out, and is now before the Court here as case No. 116, of this October, 1909, term. The trial court directed the jury to return a verdict for the amount of \$5,360.53, being the amount of the fees and emoluments of the office, with interest thereon, less the expenses of conducting the office. To the action of the Court in directing a verdict for the amount of the fees less the expenses of the office, the defendant in error, Jesus Maria Sandoval, sued out a cross-appeal or writ of error, and this cross-appeal is now before the Court here as case No. 117 of the present term.

After the filing of the suit by Sandoval to recover \$6,184.16, on December 26, 1904, as the fees and emoluments received by Albright from March 27th, 1903, to November 19, 1904, the defendant in error, Sandoval, on October 16th, 1906, filed another suit in the District Court of Bernalillo County, to recover additional emoluments of the office, received by Albright as as-

essor from the Territory of New Mexico, in the sum of \$1,561.88. A judgment for this amount, \$1,561.88 and interest, amounting in all to \$1,813.25, being rendered against Albright, an appeal was taken to the Supreme Court of the Territory of New Mexico, and this judgment was there affirmed. *Sandoval vs. Albright*, 94 *Pacific Rep.* 947. From the judgment of affirmance in the Supreme Court of the Territory, an appeal was taken to this Court, and is now pending in this Court as case No. 336 of the October, 1908, term. After the docketing of this last appeal, a motion was made by the appellee, Sandoval, to dismiss the appeal upon the ground that there was not \$5,000.00 involved. This motion was resisted by appellant, Albright, upon the ground that the answer of defendant raised the legal proposition of the power and authority of the Territorial Legislature to pass the Acts above referred to, creating Sandoval County, and to vest the power of appointment of assessor of Bernalillo County as constituted after the creation of Sandoval County in the County Commissioners of Bernalillo County, and that this Court had jurisdiction to entertain the appeal for the reason that the validity of an authority exercised under the United States was involved, as provided by Section 2, of the act of March 3rd, 1885, Ch. 355, 23 St. Lg. 443, allowing appeals to this Court from judgments of the Supreme Courts of Territories.

The appellant at the same time filed a motion to consolidate this last appeal with case No. 116, October 1909 term, which motion was granted, and this Court withheld decision upon the motion of appellee to dismiss the appeal until all cases could be heard together.

The pleadings in the cases present the whole controversy as to Albright's right to hold the office of assessor under the above statement of facts, but a demurrer was interposed and sustained to all that portion of Albright's answer setting up his claim of title to the office on the ground that the decisions of the courts in the *quo warranto* proceedings, Territory ex rel. Sandoval vs. Albright, (78 Pacific Rep. 205), and Albright vs. Territory ex rel. Sandoval, 200 U. S., page 9, were conclusive and could not be considered in the actions brought by Sandoval for the fees and emoluments.

The assignments of error on behalf of plaintiff in error, Albright, will be found on page 61 of the transcript in case No. 116, and upon page 36 of the transcript in case No. 336, October term 1908, and are as follows:

The Supreme Court of the Territory of New Mexico erred in sustaining the following errors committed by the district court from which said cause was appealed to the Supreme Court of the Territory:

1st. The Court erred in overruling the demurrer of the defendant to the complaint filed in said cause upon the several grounds mentioned in said demurrer.

2nd. The Court erred in holding that the appellant and defendant was responsible to the appellee and plaintiff for any moneys received as the incumbent of said office.

3rd. The Court erred in holding that the said complaint stated facts sufficient to constitute a cause of action against the appellant.

4th. The Court erred in holding that the plaintiff was qualified to hold said office, and was therefore entitled to receive the fees and emoluments thereof.

5th. The Court erred in holding that the appellant was not the lawful incumbent of said office.

6th. The Court erred in holding that the said office was not vacant by reason of the legislation referred to in paragraphs 7 and 8 of the amended answer to said complaint.

7th. The Court erred in sustaining plaintiff's demurrer as to the first, second, third, fourth and fifth grounds of said demurrer, to defendant's amended answer.

8th. The Court erred in directing a verdict in favor of the plaintiff for the sum of \$5,360.53.

9th. The Court erred in directing any verdict whatever in favor of the plaintiff.

10th. The Court erred in overruling defendant's motion for a new trial.

11th. The Court erred in excluding from evidence the proceedings of the board of county commissioners under date of March 23rd, 1903, offered in connection with the evidence of the witness Arthur E. Walker, and also in excluding the bond and oath of office of the defendant.

12th. The Court erred in excluding the question as to what precinct of Sandoval County the plaintiff lived in when he was elected to office.

and as to whether he ever voted outside of said precinct.

Transcript, page 61.

And in case No. 336, the assignment of errors is as follows:

The Supreme Court of the Territory of New Mexico erred in sustaining the following errors committed by the district court from which said cause was appealed to said Supreme Court of the Territory:

1. The Court erred in sustaining the motion of appellee for judgment on the pleadings.
2. The Court erred in holding that appellant and defendant was responsible to the appellee and plaintiff for any moneys received as the incumbent of said office.
3. The Court erred in holding that the complaint stated facts sufficient to constitute a cause of action against the appellant.
4. The Court erred in holding that the plaintiff was qualified to hold said office and was therefore entitled to receive the fees and emoluments thereof.
5. The Court erred in holding that the appellant was not the lawful incumbent of said office.
6. The Court erred in holding that said office was not vacant by reason of the legislation referred to in paragraphs 5, 6 and 7 of the answer to said complaint.
7. The Court erred in overruling defendant's motion to set aside the judgment and grant him a trial of said cause.
8. The Court erred in rendering judgment for the plaintiff and appellee.

Transcript case No. 336, page 36.

The records in the cases and the foregoing assignments of error raise legal propositions, which will be discussed under the following headings:

1. The entire controversy, including the status of the parties, as to who was *de jure* assessor of Bernalillo County, is before this Court.

2. The Acts of the Legislature of New Mexico of 1903, creating the County of Sandoval, and the act amendatory thereto, were within the powers of the legislature.

3. The effect of the Act of the Legislature of New Mexico, creating Sandoval County, and the act amendatory thereto, was to create a vacancy in the office of assessor of Bernalillo County, and to provide for the filling of such vacancy.

4. The appointment of plaintiff in error, Albright, by the board of county commissioners of Bernalillo County, in the manner provided by the amendatory act to the act creating Sandoval County, was not void by reason of the existence of a general act of the legislature, providing that when a vacancy in county offices arises "by reason of death, resignation, or otherwise," the vacancy shall be filled by the governor.

5. The legislation is not void because it provided for a different manner of electing the assessor from that provided for the selection of assessors in other counties of the Territory.

6. Residence is a necessary qualification for

holding office, and the question of Sandoval's disqualification to hold the office for this reason, involves his right to the office and the recovery of the emoluments.

7. The Territorial Legislature had the power to declare such a vacancy, irrespective of the question of Sandoval's residence.

8. The acts creating Sandoval County went into effect from the date of their passage, so far as the County of Bernalillo and the offices affected thereby were concerned.

9. The appointment of plaintiff in error, Albright, to the office of assessor was legal, and no recovery could be had against him for the fees and emoluments by Sandoval.

10. The defendant in error, Sandoval, is not entitled to recover the gross receipts of the office, on his cross-appeal.

11. Case No. 336, October Term, 1908, should be decided in conjunction with the main case, and the motion of appellee to dismiss should be overruled.

BRIEF AND ARGUMENT.

I.

The Entire Controversy, Including the Status of the Parties, as to Who was De Jure Assessor is before this Court.

The complaint alleges that Sandoval became, by virtue of his election to the office of Assessor in 1902, the only person lawfully authorized to

discharge the duties and enjoy the privileges appertaining to said office, until the thirty-first day of December, 1904. The complaint also alleges, paragraph 2, (page 5 of the transcript), that the plaintiff, Sandoval, was restored to the possession of the office by virtue of the *quo warranto* proceedings. The allegation of the complaint that Sandoval was entitled to discharge the duties and enjoy the office until the 31st of December 1904, is denied by paragraph 2 of the answer, page 9 of transcript and the answer also sets up the Acts of the Legislature, and the appointment of plaintiff in error by the Board of County Commissioners, and that the office of Assessor had become vacant by the enactment of the legislation referred to, and also that by virtue of Sandoval becoming a resident of that portion of Sandoval County which had formerly been a part of Bernalillo County, he ceased to be the Assessor. Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the answer, as set out on pages 8, 9 and 10 of the transcript, were demurred to by plaintiff Sandoval, and the demurrer sustained. The only defense allowed defendant Albright, was paragraphs 9 and 10, wherein he set up the amount paid by him for expenses in conducting the office.

The writ of error brings up the whole cause for review, and although the decision in the *quo warranto* case may have been binding on the courts of New Mexico as the law in the present cases, it does not necessarily bind this Court.

and we insist that we are entitled to have the questions reviewed here, upon the pleadings as settled in the courts below.

In *United States vs. Denver & Rio Grande Ry. Co.*, 191 U. S., 86, 48 L. Ed. 105, this Court says:

"While the Supreme Court of New Mexico, upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitations. As its judgment upon the first writ was merely for a reversal of the court below, and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this Court. Upon the present writ however, we are at liberty to revise the action of the court below in both instances."

U. S. vs. Denver & Rio Grande Ry. Co., 191 U. S. 86; 48 Law Ed. 105.

By analogy the rule applies here, although the judgment in the *quo warranto* case was final, in so far as it decided as between the Territory and Albright his right to hold the office, yet that question could not be reviewed in this Court because of a want of the necessary amount involved, as held by this Court, and was therefore dismissed on appeal, (200 U. S. 9), but in so far as it enters into the right of these private parties to the emoluments of the office and as a question of law raised in this case, the

views of the Supreme Court of New Mexico are subject to revision.

Crary vs. Dye, 208 U. S. 515 (52 L. Ed. 595) was twice before the Supreme Court of New Mexico. In the first decision it was held that an alias writ of attachment was void under the New Mexico statutes, and the case was reversed and remanded, (12 N. Mex. 460 78 Pacific Rep. 533). Upon the second hearing the Court held itself bound by the former decision, but the Supreme Court of the United States held that the writ of error brought up both questions for review, and proceeded to consider them.

Dye vs. Crary, 208 U. S. 515, 52 L. Ed. 595.

See also *Fitzpatrick vs. Flanigan*, 106 U. S. 648; 25 L. Ed. 211.

Mendenhall vs. Hall, 134 U. S. 559, 33 L. Ed. 1012.

Gallagher vs. Jones, 129 U. S. 194; 32 L. Ed. 658.

If plaintiff in error is bound by the decision of the Supreme Court of New Mexico in the *quo warranto* case, then he is in the anomalous position of having a right to a review only as to a portion of his case, and his real defense and the only one which can avail him is precluded, because it was decided in a proceeding which did not involve a monetary consideration

sufficient in amount to admit of an appeal to this Court.

The Court in the *quo warranto* case did not decide, nor pretend to decide, the right of Sandoval to the office of assessor. The Supreme Court of New Mexico, in Albright vs. Territory ex rel. Sandoval, 79 Pacific Rep. 719, expressly that Sandoval's right to hold the office was not involved. We quote from page 722, 679 *Pacific Rep.*

"At common law, in proceedings of this character, the respondent's title to the office was the sole issue to be tried, *and the relator's title was not in issue*, and was immaterial, except so far as it might be necessary to show that he has sufficient interest to maintain the proceedings. While of course in many cases the relator's title is incidentally considered in determining the respondent's title, still the adjudication does not operate to reinstate him in office." * * *

And again at page 723, they say:

"While as suggested by relator, the error is one which, in a certain sense, can do the respondent no harm, since not being entitled to the office himself, it cannot be material to him who has it, still the effect of the clause in the judgment is to adjudicate something which was not within the issues."

79 Pacific Rep. page 722.

The judgment of the court below was therefore modified by striking out that part which ordered respondent Albright to turn over the

office, books, etc., to Sandoval. We may well insist that, had the term of office not expired, it would have been necessary for Sandoval to have enforced his own private right to the possession of the office by appropriate proceedings in the event of the refusal of Albright to turn over the same.

We contend that this Court, on this appeal, is not bound by the decision of the Supreme Court of the Territory in the *quo warranto* proceedings holding that Albright was not the lawful incumbent, either as the law of this case, nor under the doctrine of *res adjudicata*, for there is neither identity of parties nor of causes of action. The *quo warranto* case was between the people and Albright to settle the right to the exercise of the functions of the office by Albright, while the case at bar is a private litigation between Albright and Sandoval over the emoluments in which the public has no interest. The question here does not involve only incidentally the right to exercise the functions of the office, but which of these private parties are entitled to the emoluments.

Where the cases are "dissimilar as to parties and things sued for, or what is called 'the object of the judgment,' and the demand now made is not between the same parties or formed against each in the same quality," the former judgment is not *res adjudicata*.

Gaines vs. Hennen, 24 How. 553, 16

L. Ed. 119.

*See also, Carey vs. Roosevelt, 81 Fed.
611.*

The main issue in this case, and raised by the pleadings, and the one upon which Sandoval must recover the emoluments, if at all, is his own title to the office in question, for if he was not entitled to the office he could not be entitled to the emoluments. Hence the effect of the legislation creating the new county of Sandoval, and the appointment of officers for Bernalillo County must be considered here to determine Sandoval's right to the emoluments.

II.

The Acts of the Legislature of New Mexico of 1903, Creating the County of Sandoval, and the Act Amendatory Thereto, were within the Powers of the Legislature.

Section 1851 of the Revised Statutes, U. S., provides: "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. * * *

The affidavit for information in the *quo warranto* case, (page 38 of the transcript) alleges that the legislation creating the new County of Sandoval, and authorizing the appointment of plaintiff in error was void, as in contravention of the provisions of the Constitution of the United States and the legislation of Congress, and that Sandoval had a vested interest in the

fees and emoluments of the office to which he could not be lawfully deprived without due process of law, and the information itself, found at pages 40 and 41 of the transcript, specifically alleges that the Acts in question are unconstitutional and void, and of no effect in so far as they attempted or pretended to authorize or empower the selection or appointment of any other person than Sandoval to be assessor of Bernalillo County for the term for which Sandoval had been elected, and that said legislation attempts to deprive Sandoval of his right to the office for the full term without due process of law and deprives Sandoval of the equal protection of the laws and is in contravention of the provisions of the Constitution of the United States, and that said legislation is a special law regulating county affairs and granting special privileges to the board of county commissioners of Bernalillo County, and is not within the grant of legislative power granted by Congress to the territorial legislature, nor a rightful subject of legislation by said territorial legislature. A demurrer to this information was interposed, which raised three questions: (1) Had the legislature the power to summarily remove Sandoval from the office of assessor of Bernalillo County? (2) Had the legislature the power to authorize the county commissioners of Bernalillo County to fill such vacancy? (3) Does his non-residence in Bernalillo County make Sandoval ineligible to hold the office, or, in other

words, is he eligible to be reinstated. The trial court, in the *quo warranto* proceeding, sustained this demurrer, (see opinion Justice Baker, 78 Pacific Rep. page 210, et seq.). The Supreme Court of the Territory on appeal, held that no vacancy was created in the office of assessor of Bernalillo County, and that express limitations were placed upon the powers of the legislature by Congress by the Acts of July 30, 1886, 24 St., 170, c. 818, commonly known as the Springer Act, and the amendment of July 19, 1888, 25 St., 336, c. 679, which rendered any rights set up to the office under the acts of the legislature of 1903 invalid, and referring especially to its decision in the case of Territory ex rel. Curran, vs. Tomas C. Gutierrez and Severo Sanchez, in 78 Pacific Rep. 139, involving the constitutionality of the same acts. (See Territory vs. Albright, 78 Pac. Rep. pages 209 and 210.) The judgment upon which the *quo warranto* proceeding was determined is made a part of the complaint as "Exhibit A," in the case at bar for the fees and emoluments. (See transcript, page 5, paragraph II of complaint.) In the case of Territory ex rel. Curran vs. Gutierrez and Sanchez, involving the county commissioner offices, the Supreme Court of the Territory held that the act of 1903 was a local and special law regulating county affairs within the prohibition of the Springer Act above referred to. The answer of Albright, in the case at bar, demurrer to which was sustained, raises the same legal propositions.

and the action of the Court in sustaining this demurrer, we contend is before this Court here for its consideration.

The Organic Act vests the executive power in the governor by section 3, the legislative power in the legislature by section 5, and the judicial power in the courts by section 10. (Organic Act, approved September 30, 1850.) Section 8 of the Organic Act provides that "all township, district and county officers * * * shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the Territory of New Mexico." This section was amended on Sept. 9, 1850 (section 1857 Rev. St. U. S. 1878), and so far as it relates to the above quotation from section 8, it was a re-enactment and reads as follows: "All township, district, and county officers shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory." The "Springer Act," passed in 1886 provided, "That the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases: * * * Regulating county and township affairs; * * * Granting to any corporation, associations or individuals any special or exclusive privileges, immunity, or franchise whatever." This was amended or rather given a construction at the time the act of the New Mexico Legislature creating San

Juan County was approved by Congress, as follows: "That nothing in the act approved July 30, 1886, entitled 'An Act to prohibit the passage of local or special laws in the territories of the United States, to limit territorial indebtedness, and for other purposes,' shall be construed to prohibit the creation by territorial legislatures of new counties and the location of the county seats thereof." Section 2, c. 676, approved July 19, 1886.

The power to create new counties was therefore expressly left with the legislature by the Act of Congress last above referred to. (7 Fed. Stat. Ann. 268.) This power carried with it every other power incident thereto. New counties could only be created out of territory belonging to counties already organized, as the Territory of New Mexico has no unorganized counties nor has it had for many years. The detachment of territory from Bernalillo County to form Sandoval County was beyond controversy within the power of the legislature of New Mexico by express Congressional legislation, and in fact is not denied.

The act creating the County of Sandoval, and the amendatory act, are not in conflict with the "Springer Act" of 1886, and the Act of Congress in amendment thereof. The act of 1886 had prohibited the passage of local or special laws, among other, in these two cases—"locating or changing county seats," "regulating county and township affairs." The territorial

legislature passed a special act creating the County of San Juan—the act did not locate the county seat. (Acts of New Mexico 1887, chapter 13.) The location of the county seat was left to be made under a general law, and, as usual, led to a contest in the courts. Congress was appealed to, and the amendment to the Act of 1886 was passed, ratifying the act creating San Juan county, and declaring, "That nothing in the Act, etc., (Act of 1886) shall be construed to prohibit the creation by territorial legislatures of new counties and the location of the county seats thereof." An examination of the original act and the amendment shows that the latter clause removing the restriction as to the location of county seats in new counties, was an express repeal of the clause in the original act prohibiting such location. The other provision permitting the creation of new counties by special or local laws was equivalent to a declaration that the words "Regulating County and Township affairs" should not be construed as applying to the creation of new counties. *It was equivalent to giving express authority to create new counties, and to do everything necessary and proper to create them, by special and local laws.* It would be impossible to create them without subdividing counties already in existence. We call attention to the following authorities:

In California it is said, "There are other points made by appellants which we do not deem necessary to be largely discussed. They are in great part an-

swered by the decision of this court in *People vs. McFadden*, 81 Cal. 489, 22 Pac. 851, which involved the validity of the act creating the county of Orange. It must be remembered that, as held in the case just cited, an act creating and providing for the original organization of a new county is not within the prohibitions of the constitution against *special and local legislation*, and this consideration parries most of the additional thrusts made in the brief at the validity of the Glenn county act. Many of the provisions of an act creating a new county are intended to be only preliminary and temporary, and are necessary to put the new political subdivision on its feet; so that, at the expiration of time limited for the existence of the temporary expedients, the county may, in due course, take its place under the general law for the government of organized counties. And, as there is no limitation upon the means which may be employed for this preliminary organization of a county, it is not fatal to the Glenn county bill that it does not itself provide for the division of the proposed county into supervisor districts, but allows five supervisors to be, in the first instance, elected at large, who have power under the general law to divide the county into districts."

People vs. Glenn County, 35 Pacific Rep. 302-4.

People vs. McFadden, 81 Cal., 489; 22 Pac. 851.

The case of *People vs. Board of Supervisors* (N. Y. 34 N. E. Rep. 1106, is an instructive case. The question was whether a special provision in an act amending a city charter was obnoxious to the Constitution as special legislation. The Court says:

"Cities acquire their corporate life by force of special, several and purely local acts of the legislature, which creates and frames them in the regular exercise of governmental functions. They have never been created by general laws, and cannot easily or prudently be organized in any other method than by special and local enactments. It may be possible to frame some general law under which cities could be organized, but difficulties would spring up in many directions, and the probable result would be some broad and general outline still requiring to be supplemented by more or less of special legislation. Wards would be unequal, and to give a supervisor in all cases to each might in some instances give the city more power in the county than would be just, or more even than was desired. But, conceding the possibility, it had never been realized or attempted to be realized when section 18 of the constitution was adopted, and cities had always been organized by special charters. The constitution permitted that mode of organization for incorporating villages to be chartered by general law, and omitting cities, it recognized the propriety and necessity of leaving the latter to

be organized by local laws. But that permission must necessarily extend to and cover all the proper subjects of city charter, and among them are undoubtedly, the division into wards, and the allowance of a supervisor in each, or in so many as should be prudent and satisfactory. A charter which left that out, and excluded the city from having a supervisor at all, would be a maimed and imperfect exercise of the power of city organization."

In 6 Southern Reporter, 780, is a case from Louisiana. The constitution provided, that "all laws removing county seats shall, before taking effect, be submitted to the electors of the parish * * * at a special election held for that purpose." The constitution also provided "The General Assembly shall not pass any local or special law * * * for the opening or changing the place of voting." The Court held that nothing in this last provision "directs the manner in which such election" (for the removal of county seats) "shall be conducted, or suggests any inference that the general assembly is inhibited from enacting special regulations for the conduct of elections contemplated by that article." In other words, the power to provide for the removal of a county seat carried with it the power to provide special regulations for the conduct of the election which the constitution required, although there was a general election law in force, and the constitution prohibited special laws governing the conduct of elections.

The power by necessary implication gave the legislature the right to do anything by special act necessary to exercise the power expressly granted.

*Mobly vs. Police Jury, 6 Southern
Rep. 339.*

In *Forty vs. Cummings*, an act of the legislature of New York was questioned. It provided for the incorporation of the town of C. from a portion of the town of W., and for the election of a board of supervisors for the new town; and also for the election of justices of the peace for the new town. It was contended that the act was unconstitutional because it was a "local act, provided for the election of a member of the board of supervisors, and for the opening and conducting of elections and designating a place of voting in defiance of Article 3 of Section 18 of the Constitution; and also because it provides for the election of four justices of the peace for the term of one, two, three and four years, and is therefore in conflict with Section 17 of Article 6 of the Constitution, which provides that the electors of the several towns shall at their annual town meeting, or at such other times and in such manner as the legislature may direct, elect justices of the peace whose term of office shall be for four years." The Court said:

"The appellant concedes the power of the legislature to divide existing towns and to create new ones. Section

5 of Article 3 of the Constitution reading as follows: "Nothing in this section shall prevent the division, at any time, of counties and towns, and the erection of new towns by the legislature," — is almost, if not quite, an express grant of such a power: although such power would exist in the legislature, unless there was a prohibition against it in the constitution. *Where the legislature has power to enact a law, it has power to embrace in that law everything which is either necessary or proper to make it a complete whole.* It can embrace in it everything germane to the main subject of the enactment, and all necessary or proper details. As has been said repeatedly in passing upon the question as to whether a local bill embraces more than one subject, under Section 26 of Article 3, all matters germane to the subject expressed in the title may be included in the enactment. "When the subject is fairly expressed, all matters fairly and reasonably connected with it, and all matters which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title." *Astor vs. Railway Co.*, 113 N. Y. 93-109, 20 N. E. 594; *Sweet vs. City of Syracuse*, 129 N. Y. 316-333, 27 N. E. 1081, and 29 N. E. 289. The same reasoning applies to the power of the legislature to pass a law upon any particular subject. It has power to include in the law anything germane to the subject."

Fort vs. Cumming et al., 36 N. Y. S. 36

Let us apply the principle announced in the above case—it is elementary—the legislature has the power to create a new county. A new county must necessarily be created by the subdivision of old counties. This may be done by special act. The filling of offices made vacant in the old county, as well as the filling offices in the new county, is germane to the act creating the new county, and all matters which will or may facilitate the accomplishment of the new county are proper to be incorporated in the act, and are germane to title. Anything germane to the creation of a new county can be done by the special act creating the new county. Vacancies in the old county can, therefore, be filled by special act. The same New York court, in pursuing this argument, enforces it by the following:

"In the creation of a new town something more is necessary than merely to provide boundary lines. A town government must be provided for, and town officers. They cannot be left to create themselves. There must somewhere be a starting point, some method provided for electing or appointing them; and all these things—the creation of the offices, the provisions for the manner of filling them—are, as stated by the appellant, integral and necessary parts of an act providing for the creation of a new town. They are germane to the main purpose of the act. They are necessary and constituent elements of any law creating a new

town. This same contention was made in the case of the *People vs. Board of Supervisors of Westchester Co.*, 139 N. Y. 524, 34 N. E. 1106, where, under the provisions of a charter for the city of Yonkers, it was provided that the supervisors should be elected in a different manner from that provided for in the general law, and where it was held that the sections of the constitution prohibiting the passage of any local bill for the election of supervisors did not apply to cities, because cities acquire corporate life by force of special, several, and purely local acts of legislature, which creates and frames them in the regular exercise of governmental functions. That the constitution permits that mode of organization of cities, and that permission must necessarily extend to and cover all the proper subjects of a city charter, among them the division into wards, and the allowance of the supervisors in each, or in so many as may be prudent or satisfactory, and that the law that so creates and charts and organizes a city, is not, within the constitutional meaning, a local law providing for the election of members of the board of supervisors. So here the constitution permits and authorizes the legislature to create towns; and new towns, like a city, owe their corporate life to special, several, and purely local acts of legislation, either by the legislature of the state or the legislature of the county; and in the creation of new towns, it being necessary to provide for

the election of supervisors and other town officers, it seems to me that such act is not a local act providing for the election of supervisors, within the meaning of the constitution. That is not the purpose of the act. It is not the act itself; it is only a detail and necessary incident of the act, but is by no means the main subject or purpose of the law."

Port vs. Cummings, 36 N. Y. S. 48-49.

This reasoning seems logical and convincing. The legislature has the power to create new counties by special act. The creation of a new county works a vacancy in the old—this is germane to the creation of a new county. Can it not provide for filling that vacancy by the same special act which creates the new county? The question of old county or new county has nothing to do with the process of reasoning. The legislature has authority to fill vacancies either in the old or new county by special legislation,

if germane to the creation of a new county. The vacancies in the new county are caused solely by the creation of the new county. The filling of these vacancies are, therefore, necessarily germane to the creation of the new county, and, therefore, within the power of the legislature to fill them by special legislation. The grant of this power—or rather the removal of the restrictions—was subsequent to the Act of 1886. The power of the legislature, therefore, rests upon a more secure basis than if the Act of 1886 had never been passed.

The case of *State vs. Piper*, 24 N. W. 205, has a direct bearing upon both of these questions. A special act of the Nebraska legislature provided for a special election of the officers of a new county, and determining the location of a county seat. The act named commissioners to call the election, etc. It was contended that the law was unconstitutional, because it conferred corporate powers by a special act. The Court said:

"The practice in this state, both before and since the adoption of the constitution of 1875, has been for the legislature to create new counties by special acts, and from the nature of the case, to some extent, it is necessary to do so. We do not think that merely prescribing the boundaries of a county and providing the machinery by which it may be organized is within the prohibition of the constitution strictly speaking. It is not a conferring of corporate powers, but rather providing the means by which they may be exercised."

State vs. Piper, 24 N. W. 205. (Neb.)

We have not the constitution of Nebraska before us, but understand that it contains a provision similar to the clause in the Act of 1886, relating to granting of franchises, etc., by special act. The case holds that the creation of a new county, and the appointment of the commissioners, did not come within the meaning of such a

clause, and that the commissioners could be named in a special act.

In *Reals vs. Smith*, 56 Pacific 690 (Wyoming) the legislature had consolidated the offices of county treasurer and assessor, and afterwards repealed the act consolidating these two offices—providing for the election of assessors at the next general election and also providing for the appointment of assessors by the boards of county commissioners to make the assessment for 1899. It was contended, “That the uniform operation of the general election law is interrupted * * * that county officers are by the constitution required to be elected.” By the same act, it was provided that the treasurer and ex-officio collector should, with the approval of the board of commissioners, appoint a deputy assessor in each district. It was contended that the privilege of the appointment of deputy assessors constituted an “emolument” within the meaning of the constitutional inhibition prohibiting the increasing or diminishing the salary or emolument after the election of the officer. The Court held that the right to appoint a deputy was not an “emolument.” With reference to the appointment of assessors to hold until the next regular election, the Court said:

“It having been claimed in *Minnesota* that county offices could be filled only by election, and that an appointment was forbidden under any circumstances, the court said: ‘This construction would prevent a vacancy from being

filled by appointment for the length of time which would necessarily intervene between the occurrence of a vacancy and the first succeeding general election, or even a special election. Certainly this would work a great public as well as private inconvenience and injury, and, in our judgment, the constitution, framed as it was for practical purposes, need not, and should not, receive a construction so narrow." The court further stated that if provision is made for such election at stated period, the injunction of the constitution is satisfied, and that, having made such provision, the legislature is not restrained from making provision for filling vacancies by appointment until a next general election, or for the balance of an unexpired term, as may be deemed advisable. *State vs. Benedict*, 15 Minn. 198 (Gil. 153); *Jordan vs. Bailey*, 37 Minn. 174, 33 N. W. 778, and *Penney vs. Mahoney*, Id. See also, *Sprange vs. Brown*, 40 Wis. 612, *People vs. Hurlbut*, 24 Mich. 44, *State vs. Harris* (N. D.) 45 N. W. 1101."

Reals vs. Smith, 56 Pacific 690, *Wyo.*

The Act Creating Sandoval County, and Its Amendment, Is Not a Regulation of County Affairs.

The county affairs referred to in the Springer Act relate to the internal business affairs of the

County and not to the manner of selecting or removing its officers. If the Legislature had the right to declare and fill vacancies by special legislation, and it undoubtedly had unless prohibited by the Springer Act, then the legislation in question was constitutional, and had the effect of vacating the office of Assessor of Bernalillo County, and if the office was vacated, then it becomes immaterial in so far as this case is concerned, whether Albright was or was not entitled to the office. Sandoval must recover, if at all, on the strength of his own title to the office rather than on the weakness of his advasaries title.

In Montana, the legislature created a new county, out of the territory formerly included in three counties, and fixing dates for the meetings of the commissioners of the three counties for the adjustment of the debts of the original counties and the new county, etc., The state constitution, Section 26, Article 5, provided, "The Legislative Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, * * * regulating county or township affairs * * * creating offices or prescribing the powers or duties of officers in counties, cities, townships or school districts. In all other cases where a general law can be made applicable, no special law shall be enacted." The language as to "regulating county affairs" is the same as our Act of Congress. The latter, however, does not contain

the provision as to creating offices, etc. The Court said:

"Creating a new county by a special act is not forbidden by the state constitution, and matters necessarily incidental to the creation of a new county, which are provided for in the act creating it, solely for the purpose of organizing the new county and setting it in motion as one of the governmental subdivisions of the state, do not come within either the letter or the spirit of the inhibition of Section 26, Article 5 of the Constitution."

*Holiday vs. Sweet Grass County, 48
Pacific 533.*

Adjusting the debts of the counties was certainly much more a regulation of county affairs than the naming of temporary officers to fill vacancies and the filling by them of other vacancies in what remained of the original county, caused by the creation of the new county. The effect of the decision is clearly this:—The legislature had the power to create a new county by special act, and do by such act all incidental matters connected with its creation, —and the exercise of such power by special act is not in conflict with the provision prohibiting the regulation of county "affairs" by special legislation.

In *Mode vs. Beasley*, 42 N. E. Rep. 727, the Supreme Court of Indiana had before it a special act for the removal of a county seat. The constitution of Indiana prohibited special acts

"regulating county and township business."

The Court held as follows:

"The term 'business' when applied to a public corporation, signifies the conduct of the usual affairs of the corporation and the conduct of such affairs as commonly engage the attention of township and county officers. It does not mean the performance of an act which can be done only in a particular case, and by authority of a special law. This statement of the law is, we think, correct, and especially applicable to the case now before us, and hence, though the act of 1889 be local and special, as we think it is, yet, being on a subject not embraced in Section 22 of Article 4 of the Constitution, the determination of the legislature, by enacting the law, that one of general and uniform operation throughout the state could not be made applicable, is final and conclusive upon the courts.

"Again, an act on the subject of the removal of a county seat is no more an act regulating county business than the act of a board of commissioners of a county in purchasing real estate on a judgment in favor of the county; and yet an act entitled 'Act to legalize certain acts of the board of commissioners of Clifton county in the purchase of certain grounds at sheriff's sale; vesting a sufficient title thereto in the said county, providing for the payment thereof and other matters properly connected therewith and declaring an emer-

gency," was held not to be an act on the subject of regulating county business in *Kelly vs. State*, 92 Ind. 236. So is the act creating a criminal or superior court for a particular county an act regulating county business as much as an act for the removal of a county seat, and yet such acts have been uniformly upheld by this court as no infringement of that constitutional provision. *Clem vs. State*, 33 Ind. 418; *Vickery vs. Chase*, 50 Ind. 461. So is an act legalizing the establishment of a free gravel road by a board of county commissioners of a particular county, and yet such an act was upheld as not an act affecting a regulation of county business in *Johnson vs. Board*, *supra*.

Mode vs. Beasley, 42 N. E. 130.

It may be said that "affairs" is a broader term than "business." We insist that the word "business" in the Indiana constitution and the word "affairs" in the Act of Congress are used in exactly the same sense, and that the Indiana authority is clearly in point.

For definition of "affairs" and "business," see

Words and Phrases Judicially Defined,
Vol. 1, page 238, (affairs), page 215
(business).

Words in a statute are to be given the meaning they have in common use, unless there are very strong reasons to the contrary.

Tennessee vs. Whitworth, 111 U. S.
146.

III.

The Effect of the Act of the Legislature of New Mexico Creating Sandoval County, and the Act Amendatory Thereto, Was to Create a Vacancy in the Office of Assessor of Bernalillo County, and to Provide for the Filling of Such Vacancy.

Section 3 of the Act of the Legislature, (Act of March 10th, 1903, Chap. 27) is as follows:

"Section 3. On or before the first day of April, 1903, the county commissioners of the present County of Bernalillo shall give notice of an election to be held on the fourteenth day of April, 1903, within the County of Bernalillo as the same will be constituted after the passage of this act, for the election of two county commissioners, one probate judge and one assessor, to serve until their successors are elected and qualified at the next general election. Said officers so named in this section to be at the time of said election actual *bona fide* residents of the said County of Bernalillo as the same shall be constituted after the passage of this act. The returns of said election to be made as the returns of general elections are made."

And this section was amended by Chapter 49 of the same session, passed two days later, approved March 12, 1903, and which amendment is as follows:

"Section 3. That T. C. Gutierrez, to

fill the unexpired term of the second district, and Severo Sanchez, be and they hereby are appointed and constituted county commissioners for the County of Bernalillo, as the same is constituted after the creation of Sandoval County, and the said T. C. Gutierrez and Severo Sanchez shall qualify as said county commissioners on or before the fifth day of April, 1903, and shall together with the county commissioner now in office for the said County of Bernalillo, hold a meeting not later than the tenth day of April, 1903, and said three persons as a board of county commissioners for Bernalillo County shall appoint one assessor and one probate judge for the said County of Bernalillo to serve until their successors are elected and qualified at the next general election."

This was clearly a declaration by the legislature of an existing vacancy in the office of assessor of Bernalillo County, else why would it provide for the election or appointment of an assessor? Surely, it was not intended to provide two assessors for Bernalillo County. If there was to be only one assessor, the only way to give effect to the appointment was to treat the office as vacant. The statute creating the office of county assessor provides for the election of "a county assessor for each county in this territory." This act provides for the appointment by the board of "an assessor and one probate judge to serve until their successors are

elected and qualified at the next general election." Section 772 of the Compiled Laws of 1897 is to be construed with this act of 1903 in determining what the intention of the legislature was.

In the case of *Fox vs. McDonald*, decided by the Supreme Court of Alabama, the doctrine is laid down in accordance with what we contend for, that the "abrogation or withdrawal of that power (the power of appointment) and the substitution of new appointive power in another body, necessarily, *ipso facto*, annulled the tenures of their appointees, there being nothing in the act retaining them in office." Citing, *Lane vs. Kolb*, 92 Ala. 636; *State vs. Board of Public Lands and Buildings*, 7 Neb. 42.

Fox vs. McDonald, 21 L. R. A. 537.

Without abolishing the office, the legislature, if there are no constitutional restrictions on it, may, before the expiration of the term of the incumbent, legislate him out and another into the office.

In Wisconsin case, it is said:

"It is readily conceded that in case of a constitutional office, the term of which is prescribed by the instrument, the legislature cannot abridge the term thereof, nor transfer the duties to some other officer. But in respect to an office created entirely by an act of the legislature the case is different. There the legislature may restrict the term, or abolish the office altogether, as they

may think the public interests require (State vs. Baumbach, 12. Wis. 310), there being no constitutional restriction upon its power in the special case. Any other rule would almost paralyze the legislature." The case then quotes, "It is of the nature of legislation to create and abolish offices according as they may be deemed useful or superfluous." Cowen J. in the People vs. Morrell, 21 Wend. 563-576. The case then proceeds: "It was not claimed that the plaintiff had any vested right in his office which the legislature could not abrogate or destroy. Such a position would be clearly untenable upon the authorities, and as a principle utterly inadmissible under our form of government. On this point the remarks of Ruggles, C. J., in Conner vs. Mayor, etc., of New York, 5 N. Y. 285-295, are just and appropriate. 'Public offices in this state,' says the Chief Justice, 'are not incorporal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions they are voluntarily taken and may at any time be resigned. They are created for the benefit of the public, and not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the officeholder.'"

The State and DeGuenther vs. Douglass, 26 Wis. 428; 7 Am. Reports 87.

See also:

State vs. Davis, 44 Mo. 129.

People vs. Haskell, 5 Cal. 357.

Attorney General vs. Squires, 14 Cal.

12.

Note to Hoke vs. Henderson, 25, Am.

Dec. page 703.

The Supreme Court of the United States has announced the proposition. In *Fisk vs. Jefferson Police Jury*, the Court said:

"We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government, or with the appointing body as to prevent the legislature or other proper authority from abolishing the office or diminishing the salary thereof during the term of the incumbent or removing him from office." Citing:

Butler vs. Pennsylvania, 10 How. 402.

Stewart vs. Jefferson Police Jury, 116

U. S. 153.

Butler vs. The Commonwealth of Pennsylvania, 10 How. 416, is a leading case on the subject, and the note in 4 Notes on U. S. Reports, 922, shows that it has been generally followed, not only by the Supreme Court of the United States, but by the courts everywhere. This case clearly holds that the right to hold an office and enjoy the fees and emoluments thereof is not a contract, and no vested right is conferred upon

the incumbent which is under the protection of the Constitution of the United States, prohibiting a state from passing any law impairing the obligation of a contract.

One of the latest decisions of the Supreme Court of the United States on this very question is *Taylor and Marshall vs. Beckham*, 178 U. S. 548, 44 L. Ed. 1187, where it is said:

"In *Crenshaw vs. United States*, 134 U. S. 99, 104, 33 L. Ed. 825, Mr. Justice Lamar stated the primary question in the case to be: 'Whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him.' And he said, speaking for the Court: 'The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right.' *Butler vs. Pennsylvania*, 10 How. 402, 13 L. Ed. 472; *Newton vs. Commissioners*, 100 U. S. 548, 25 L. Ed. 710; *Blake vs. United States*, 103 U. S. 227, 26 L. Ed. 462; and many other cases. The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property secured by contract, but compensation for services actually rendered. Nor does the fact that the Constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit

the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."

Taylor vs. Beckham, 178 U. S. 548; 14 L. Ed. 1187.

See also:

Crenshaw vs. U. S., 134 U. S. 99.

Long vs. Mayor, 81 New York, 426.

People vs. Hurlbut, 24 Mich. 44; 9

Am. Rep., 106.

Denver vs. Hobart, 10 Nev. 30.

Territory vs. VanGaskin, 6 Pac. Rep. 30. (Mont.)

Removal without notice does not violate the constitutional provisions by depriving a person of property without due process of law or denying him the equal protection of the laws.

From what we have said this necessarily follows. It was contended in the courts below that the case of *Kennard vs. Louisiana*, 92 United States 480, was an authority for the proposition that removal from an office without an opportunity to be heard and a judicial determination of the right to hold office, was in violation of the XIV Amendment. This case does not consider the question as to whether an officer has any vested right in his office. The only question which the court discusses and decides is

the validity of an act of the legislature of the State of Louisiana, relating to judicial offices, Kennard being Associate Justice of the Supreme Court, and the case decides, although the act was very summary in its terms, requiring only twenty-four hours' notice and an immediate hearing, that the act itself provided for due process of law within the meaning of the XIV Amendment to the Constitution of the United States. We think it may fairly be assumed that the office which Kennard held was a constitutional office under the constitution of the State of Louisiana. What ever may be claimed for this case, however, later cases of the Supreme Court of the United States have explained what the court meant by this decision and limited its effect.

The case of *Foster vs. Kansas*, 112 United States 201, was also relied upon by counsel as sustaining the position which he takes. That case was a proceeding by *quo warranto* in Kansas to remove a district attorney for failure to enforce the law prohibiting the sale of intoxicating liquors. The defendant had a trial before a jury and sued out a writ of error to the Supreme Court of the state. The case went off on a motion to dismiss for want of jurisdiction and to affirm, which the court said could be done under Rule 6, Section 5 of the Supreme Court of the United States. The court held that as the question of the constitutionality of the statute under which the proceedings was

had was directly raised by the defendant and decided against him, that it had jurisdiction to review the decision of the Supreme Court of Kansas, and affirmed the judgment of the court below; the sole question passed upon by the Court being the constitutionality of the statute of Kansas prohibiting the sale of intoxicating liquors, stating in conclusion that if a statute for the removal of a personal from office provided for bringing the party against whom the proceeding was had into court and notifying him of the case he had to meet, that it was not repugnant to the Constitution of the United States.

In the Goebel case, above cited, *Taylor vs. Beckham*, 178 U. S., the sole question before the Supreme Court was whether when a statute providing for the removal of an officer by a court, the court was properly vested with power to proceed at all. And there was no question before the Court as to whether the right to a public office of a state was, or was not, protected by the XIV Amendment to the Constitution of the United States.

In the case of *Wilson vs. North Carolina*, 169 United States 593, a statute was before the Supreme Court which authorized the governor to suspend an officer and appoint his successor without a hearing, and it was contended that this was in conflict with the XIV Amendment to the Constitution. The Court held that whether there should be a hearing at all or not,

before suspension by the governor, was purely a matter for the state legislature to determine, having regard to the constitution of the state alone, and that the procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by that court.

In *Taylor vs. Beckham*, *supra.*, the Supreme Court of the United States, quoting from the opinion of Justice Lamar, in *Crenshaw vs. United States*, 134, U. S., 99 expressly decided that the incumbent of an office has no vested interest or contract right in it, and refers to *Butler vs. Pennsylvanian*, *supra.*, and expressly approves the doctrine laid down in that case.

In *People vs. Squires*, 14 Calif. 12, the office of sheriff was a constitutional office and the legislature had made it the duty of the sheriff to collect certain miners' licenses. By act of the legislature, this was taken away from the sheriff and made the duty of a collector to be appointed by the board of supervisors to collect such tax. The Court said:

"The same power that made can destroy, unless, indeed, there be some vested right created by the act, or some right of property. So far as the office *exists in the incumbent*, it is an office created by legislative act. The constitution affixes no period of tenure to this office of tax collector; nor does it provide any mode of *appointment*. The vesting of this office in the sheriff being by legislative act, though the *office* can-

not be destroyed by the legislature, yet the legislature, not restricted in this respect by the constitution, may direct in what manner the duties shall be discharged, and how the office may be temporarily filled."

People vs. Squires, 14 Calif. 22.

The legislation creating Sandoval County was undoubtedly special, but the Springer Act itself recognizes the right of the Territorial Legislature to enact special legislation, not in conflict with its provisions. As to the powers of a territorial legislature, unless restricted by the Constitution and laws of the United States, see:

Trustees Vincennes Univ. vs. State, 14

How. 267; 14 L. Ed. 416.

Rogers vs. City of Burlington, 3 Wall.

654; 18 L. Ed. 79.

Clinton vs. Englebrecht, 13 Wall. 446.

The provisions of the acts in question were only provisional and until the next general election. The Legislature of New Mexico, in this instance was providing for the inauguration and putting in motion the new County of Sandoval, and of what remained of the old County of Bernalillo, and the appointment of the commissioners, and by such commissioners of the assessor and probate judge of Bernalillo County, was merely provisional, until the next general election.

The case of *People vs. Hurlbut*, 24 Mich. 44; 9 Am. Rep. 117, was a case where the legislature

passed an act "to establish a board of public works in and for the City of Detroit." The members or officers of which board were appointed by the legislature and in the act itself. It was claimed it was in violation of the constitution of Michigan. The Court, by Judge Cooley, said:

"I have no doubt it was entirely competent for the legislature to abolish the old boards and provide for a new one to take the place of all. That would be but the ordinary exercise of legislative supervision and control in matters of municipal legislation. I think, also, that the legislature might make provisional appointments to put the new system into operation. The right to do this appears to me to be incident to the right to confer and recall corporate power, and rests upon the same ground as the right to provide for the organization of the municipal corporation in the first place, for the apportionment of its property and debts if its territory should be divided and organized into two, or for the winding up of its concerns if the charter should be taken away. There is no doubt of the right of the state to do any of these things; nor by virtue of any general authority to take to itself the management of the local concerns, but because the inauguration and modification of local government can only be provided for without confusion and injustice by the aid of the guiding and assisting hand of the authority that cre-

ates and modifies. The right in the state is a right, not to run and operate the machinery of local government, but to provide for and put it in motion. It corresponds to the authority which constitutional conventions some times find it needful to exercise, when they prescribe the agencies by means of which the new constitution they adopt is to be made to displace the old."

*People vs. Hurlbut, 24 Mich. 44; 9
Am. Rep. 111.*

This case is an authority for the rightfulness of the act of the legislature in naming the county commissioners and authorizing them to appoint an assessor and a probate judge temporarily in order to put in operation the new County of Sandoval and to continue the proper government of the old County of Bernalillo.

In the case of *Territory vs. Van Gaskin*, 6 Pac. Reporter 30, the territorial legislature of Montana enacted a law vacating the offices of county commissioners of a county and naming three other persons in the act itself as commissioners of the county. The Supreme Court of Montana expressly held that the appointment of these three persons named in the case was within the limits of the Act of Congress, which required that the county officers should be appointed or elected in such manner as the legislative assembly and the governor may provide. "The governor and the legislative assembly have the power to provide the manner of appointment,

therefore they had the right to appoint directly." The case quotes the organic act, providing that "all township, district and county offices shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory," and says:

"There is nothing in the above Act of Congress which in any way limits the power of the legislative assembly in respect to the foregoing particulars. All the above matters relating to county commissioners are by this act committed to the governor and legislative assembly of the territory, when acting together in a legislative capacity, to be provided for according to their discretion. So far, therefore, as the above Act of Congress is concerned, this office, having been created by legislative enactment, was wholly under legislative control. It had the power to lengthen or abridge the term of office, or to declare the office vacant and appoint another to fill the vacancy, at least in so far as to make a provisional appointment was concerned."

Territory vs. Van Gaskin, 6 Pac. Rep.

32.

This decision was rendered before the passage of the Act of 1886, with reference to special legislation: but as we contend, there is no limitation in the Springer Act which changes the rule. The case quite fully reviews the authorities bearing upon this proposition.

The legislature and governor, under the Act

of Congress, could themselves appoint to office directly without the enactment of any law authorizing them so to do, and this is expressly decided by the Supreme Court of Montana in the case of *Territory vs. Van Gaskin*, *supra*. They say:

"The governor and legislative assembly have the power to provide the manner of the appointment, therefore they had the power to appoint directly. The law was 'the manner' of the appointment."

That is to say, the law naming the officers in the act, and the amendment authorizing these officers to appoint an assessor and probate judge, was the manner of the appointment, and it was the act of the governor and legislative assembly. As clearly shown, it would have been absurd and unnecessary for the legislature to have passed a general law providing that all vacancies may be filled by the legislature and governor, when the Act of Congress has authorized them to fill such vacancies, unless, of course, they are restricted by the Springer Act. It certainly follows that if the legislature and governor had the right to appoint to these offices themselves directly, that they could delegate that power to some other board or person, as was done in the case of the assessor and probate judge.

The case of *Territory vs. Scott*, 20 N. W. 401, a Dakota case, is directly in point. There the legislature passed an act removing the seat of

government from Yankton and authorized certain commissioners to select some other city as the capital and locate the seat of government at the place so selected, and it was held that it was not in conflict with the organic act of the territory, in that it delegated to such commissioners a duty that could only be lawfully performed by the governor and the legislative assembly. The Court in meeting this objection said:

“What legal principle is contravened by the delegation of this power? The legislature made the law. Every act done under it by these commissioners is done in pursuance and by virtue of the law, and derives its sole vitality therefrom, and when done is to be regarded as the act of the legislature itself.”

In the case of *Waterman vs. Freeman*, 80 Calif. 233; 22 Pac. Rep. 173, the question of the appointment by legislative act of commissioners was before the Court, under the provisions of the constitution of California. The syllabus, which is fully borne out by the opinion, is as follows:

“Under Const. Calif. 1879, Par. 1, providing the powers of the government of the state shall be divided into three separate departments, the legislative, executive and judicial, and no person charged with the exercise of powers belonging to one department shall exercise any functions appertaining to the others, except as expressly directed or

permitting in the constitution; and Article 20, Par. 4, that all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct,—the power of appointment to office is not exclusively an executive function, but, so far as it is not regulated by law, and, if the law so prescribes, may be exercised by the legislature; and Pol. Code Cal., Par. 2292, providing for the election of a board of trustees, to control the state library, by the legislature in joint convention assembled, is constitutional.”

Waterman vs. Freeman, 22 Pac. Rep. 173.

IV.

The Appointment of Albright by the County Commissioners, in the Manner Provided by the Amendatory Act to the Act Creating Sandoval County, Was Not Void by Reason of the Existence of a General Act of the Legislature, Chapter 2 of the Laws of New Mexico, 1901, Providing That When a Vacancy in County Offices Arises “By Reason of Death, Resignation, or Otherwise,” the Vacancy Shall be Filled by the Governor.

The Supreme Court of the Territory, in the *quo warranto* proceedings involving the county

commissioner officers held that the legislation in question was void as in conflict with the act of 1901, and that the words "or otherwise," should not be construed *ejusdem generis*, and that the power of appointment remained in the governor of the territory. (See *Territory vs. Gutierrez*, 78 Pacific Reporter, page 139.) This same ruling was followed by the Supreme Court and influenced it in its decision in the case of the assessorship. If the legislature and the governor had the power to enact a law vesting this power in the governor, they had the right to repeal the law. The exercise of the power, as was done in this case by the governor and the legislative assembly vesting the appointment in the county commissioners, was itself a repeal of the law *pro tanto*. If the power to appoint or provide for the appointment of county officers was vested in the governor and the legislative assembly by the organic act, nothing is clearer than that it is beyond the power of the legislature to surrender that power in such a manner as would forever prevent it resuming it whenever it saw fit to do so. In fact, the power to provide for the appointment of such officers is vested in the legislature and the governor by the organic act of the territory. It seems plain that it is beyond the power of one legislature to irrevocably deprive any subsequent legislature of any power vested in the legislature itself by the organic act; that is to say, to irrevocably part with any such power so that it could not

be resumed by any subsequent legislature.

In the case of the *United States vs. Bevans*, 3 Wheaton, 388-390, the court had under consideration a statute providing: "That if any person shall, within any fort, arsenal, dockyard, magazine or in any other place, or district or country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person, or persons, on being thereof convicted, shall suffer death." In construing this section, the court said:

"That a government which possesses the broad power of war; which 'may provide and maintain a navy;' which makes rules for the government and regulation of the land and naval forces, has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section as on the 8th, the inquiry respects, not the extent of the power of Congress, but the extent to which that power has been exercised.

"The objects with which the word 'place' is associated, are all, in their nature, fixed and territorial. A fort, an arsenal, a dockyard, a magazine, are all of this character. When the sentence proceeds with the words 'or in any other place or district of country under the sole and exclusive jurisdiction of the United States,' the construction seems irresistible that, by the words 'other place' was intended another place of a similar character with

those previously enumerated and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and therefore, the words 'other place,' or 'district of country,' were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character."

United States vs. Berans, & Wheaton
391.

See also:

United States vs. Chase, 135 U.S. 255
260.

Moore vs. Am. Trav. So., 2 How. 141.

Sedgwick on Construction of Statutes, 360.
Note, where this author says:

"It is a rule of right reason that general words may be qualified by particular clauses of a statute, but that on the other hand, a thing which is given in particular shall not be taken away by general words."

Sedgwick on Con. of Stat. 360.

It is immaterial that there was a law in force authorizing the governor to appoint to vacancies. If the legislature had the power to pass this act in the absence of such a law, it had the power to pass it with that law in force. If the legislature and the governor ever had the power to appoint by special act to office, it could not

permanently divest itself of that power and vest it in the governor alone. Irrepealable laws cannot be passed. In the language of Judge Cooley:

"To say that the legislature may pass irrepealable laws is to say that it may alter the very constitution from which it derives its authority."

Cooley on Cons. Lim. 149.

Nor can the legislature and the governor by legislation abridge or surrender any executive power vested in the governor. So the principle is equally applicable whether the appointment made in the form of legislative enactment by the governor and legislative assembly is considered as an executive or legislative act.

Upon this proposition, we content ourselves with quoting from the opinion of Justice Baker, before whom the case first arose, found in 78 Pacific Reporter, at page 149, where this proposition is fully discussed.

"It is contended that vacancies should be filled by the general law now upon the statute book, being Section 668 of the compiled laws of New Mexico as hereinbefore quoted. * * * In the case at bar the governor could not fill by reason of a vacancy occurring by death, resignation or removal. There is not mentioned the filling of vacancies caused by legislative enactment, unless it is implied in the word 'otherwise.' The duty of defining the word 'otherwise' as used by the legislature is imposed upon us. We might inquire why

the legislative power delegated to the governor the authority to fill vacancies at all. Certainly the legislature would not have delegated such power had there been a vacancy occurring while the legislature was in session. The sessions of the legislature being limited by law to sixty days, that leaves the balance of two years in which no vacancy could be filled unless such power to fill had been delegated to some person or persons. If no provision had been made by the legislative power to fill vacancies, could they have been filled? Yes; by the legislative power, and by it only. If the legislature intended that *any vacancy* that may occur shall be filled by appointment by the governor why would it specifically point out vacancies caused by death, resignation or removal? It would be a serious charge against the legislative intelligence that it meant any vacancy that might occur shall be filled by appointment by the governor, after employing the language it did. If the word 'otherwise' is to be construed to mean 'any vacancy,' then the words 'caused by reason of death, resignation or removal' were surplusage and must stand for naught, because they are included in the words 'any vacancy.' We believe it to be a universal rule of construction that when general words follow particular and specific words, the general words are confined, in meaning, to the things of like kind and nature designated by the specific words. * * * Sutherland on

Stat. Const. Sec. 268; *Jensen vs. State*, 19 N. W. Rep. 378 (Wis.); *State vs. Dennison*, 82 N. W. Rep. (Neb.) 383; *Roberts vs. Jackson*, 4 Yerg. (Tenn.) 322; *State vs. Wood County*, 72 Wis., 637. * * * Applying this rule of construction to Section 688 of the compiled laws, *supra*, it would seem that the governor may fill vacancies in the office of county commissioner when such vacancy is caused by death, resignation or removal, or vacancies caused in a like or similar manner. It certainly could not extend to a vacancy caused by a legislative enactment. Such a vacancy is not of like kind, character or nature, as one caused by death, resignation or removal. Nor could it extend to such a vacancy for the further reason that the reason for delegating the power to the governor would not then exist. The legislative power being in a position then to act, the legislature being in session, and a vacancy occurring at such time, would not prompt the legislative power to delegate its power to fill such vacancies. As to whether or not the removal by legislative enactment is like kind and character as death, resignation or removal, was construed by the legislature when it passed the act appointing the respondents. In other words, if conferring upon the governor the power to appoint is in seeming conflict with the act complained of, then the legislature has construed the former act by restricting it not to include vacancies caused by

legislative enactment. But were the act appointing respondents in conflict with said Section 688, the last act would be in force. The power that authorized the governor to appoint would certainly revoke it. A legislative interpretation of a statute is not binding upon a court, but should have great weight. In *Jackson vs. Board of Supervisors*, etc., 34 Neb., 680, the court says: "Legislative construction, although not necessarily conclusive upon the judicial part of the government, it is entitled to great weight when deliberately given." (Citing: *Bishop on Written Law*; *Sedgwick on Stat. Const.*; *Contant vs. People*, 11 Wend. 511.)

28 Pacific Reporter, page 149.

V.

The Legislation is Not Void Because It Provided for a Different Manner of Selecting the Assessor From That Provided for the Selection of Assessors in Other Counties of the Territory.

In the case of *Guild vs. Bank*, 57 N. W. 499, the legislature of the Territory of Dakota passed a law making one rate of interest legal in part of the territory, different from the rate which was legal in the other parts of the territory. The validity of the act was sustained, as not being in conflict with Section 1851 of the Revised Statutes, or the Act of Congress of July

30, 1886, the "Springer Act." The Supreme Court of the Territory of Dakota, said:

"Assuming then, that a territorial legislature may lawfully enact any law that would be within the ordinary powers of a legislature of a fully organized state, not in conflict with its state constitution, we are of the opinion that the law in question was a valid exercise of the law-making power vested in the territorial legislature. That a state legislature, unrestrained by its constitution, has the power to enact such a law, seems to be well settled. Mr. Cooley, in his work on Constitutional Limitations, (5th Ed. pp. 428-483,) says: 'Laws public in their object, may, unless express constitutional provision forbids, be either general or local in their application. They may embrace many subjects, or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. The authority that legislates for the state at large must determine whether any particular rules shall extend to the whole state, and all its citizens, or, on the other hand, to a subdivision of the state, or a single class of its citizens only. * * * These discriminations are made constantly, and the fact that the laws are of local or special operation, only, is not supposed to render them obnoxious in principle. * * * If the laws be otherwise unobjectionable, all that can be required, in these

cases, is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.' And in a foot note, on page 482, the author says: 'To make a statute a public law of general application, it is not necessary that it should be equally applicable to all parts of the state. All that is required is that it shall apply equally to all persons within the territorial limits described in the act. *State vs. County Com'rs. of Baltimore*, 29 Md. 516. See *Pollock vs. McClurken*, 42 Ill. 370; *Haskel vs. Burlington*, 30 Iowa 232; *Unity vs. Burrage*, 103 U. S. 447.' * * *

Guild vs. Bank, 54 N. W. 499.

In *Missouri vs. Lewis*, 101 U. S. 22, the Supreme Court of the United States, speaking by Mr. Justice Bradley, says:

"Each state has the right to make political sub-divisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities, and another for rural districts; one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny it this right. We think it is not

denied or taken away by anything in the Constitution of the United States, including the amendments thereto. We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or *judicature* it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law, and its methods of procedure, for the city of New York and the surrounding counties, and the common law, and its methods of procedure, for the rest of the state, there is nothing in the Constitution of the United States to prevent it doing so. * * * If a Mexican state should be acquired by treaty, and added to an adjoining state, or part of a state, in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and *judicature* to continue unchanged in one portion, and the common law, and its corresponding *judicature*, in the other portion."

Missouri vs. Lewis, 101 U. S. 22.

VI.

Residence is a Necessary Qualification for Holding Office, and the Question of Sandoval's Disqualification to Hold the Office for This Reason, Involves His Right to the Office and the Recovery of the Emoluments.

As a general proposition, residence is necessary as a qualification for holding office. It is immaterial, however, from our standpoint as to whether the relator was a resident or had become a resident of what remained of the old County of Bernalillo or not. It was for the legislature to say at the time of the passage of the legislation, whether he was a properly qualified person to hold the office of assessor in the old County of Bernalillo. An examination of Section 3 of the act creating Sandoval County will disclose that the legislature had in mind the fact that the officers therein mentioned became non-residents of the County of Bernalillo as constituted by the act, and attempted to meet this contingency.

Meechem on Public Officers, Secs. 67,

82 and 159.

State vs. Jartshorn, 17 Ohio Reports

155.

In 23 Am. and Eng. Ency. of Law, 426, it is said with reference to non-residence caused by territorial division that when "a non-residence

so caused would create a vacancy, the officer is entitled to a reasonable time for removal." This can only be true when the legislature has not provided otherwise. It is true where the vacancy is attempted to be worked merely from the fact of non-residence occasioned by the division of the county; not where the legislature has positively created a vacancy and authorized it to be filled.

See also Mauk vs. Lock, 40 Iowa 266;

30 N. W. 566.

State vs. Hiron, 27 Ark. 398.

The Encyclopedia cites for the proposition that the officer is entitled to a reasonable time for removal into the demarcation of the new county, *State vs. Messmore*, 14 Wis. 163, and *State vs. Choate*, 11 Ohio 511. An examination of these cases show that they were cases of persons holding constitutional offices. If properly read, they are authorities in favor of our contention. The legislature in our case was not hampered by any constitutional restrictions. It would seem to be clear that the legislature has the power and authority to say that non-residence at the time of the division of the county should be considered from that time forth as a disqualification. It may say so at the time of the passage of the act itself. The authorities we have cited show that the office is wholly within the control of the legislature and gives the legislature the power to do this or to legis-

late an incumbent out of office without any reason whatever.

Section 772 of the Compiled Laws of New Mexico, 1897, provides:

"At the next general election, and every two years thereafter, there shall be elected in the same as now provided by law for the election of other county officers, a county assessor for each county in this territory, whose duties, power, and compensation shall be such as are now or may hereafter be prescribed by law." (Laws of 1884, Chap. 63, Sec. 1.)

While this section does not expressly provide that the assessor shall be a resident of the county, the legislature has said so by implication, by the passage of the Act of 1889, compiled as subsection 15 of Section 664 of the Compiled Laws of 1897, as follows:

"Hereafter when any vacancy occurs, either by death, resignation, failure to qualify or otherwise *in any county office*, except that of a member of the board of county commissioners, the board of county commissioners of the county where such vacancy occurs shall fill such vacancy by appointing a competent person to fill such office which may be vacant, *who shall be* a resident of the county and shall occupy and fill such office, and discharge the duties thereof during the remainder of the term of such office and until his successor is elected and qualified according to law."

This statute shows that the legislature had assumed that residence was necessary prior to the enactment of this legislation. The right to hold an office implies that the person holding the same should be a qualified voter in the county, district or municipality in which he holds such office.

"Where no limitations are prescribed, however, the right to hold a public office under our political system is an implied attribute of citizenship, and is presumed to be co-extensive with that of voting at an election held for the purpose of choosing the incumbent for that office; those and those only who are competent to select the officer being deemed competent also to hold the office."

Meechem on Public Officers, Sec. 67.

In *State vs. McMillen*, 23 Neb. 385; 36 N. W. Rep. 387, it is said:

"It is assumed to be the law,—the construction to be given to the constitution and statute,—though not expressed literally, that a necessary qualification of an incumbent of an elective office is that of an elector; that as the highest authority rests wholly with the electors, the delegated authority was intended to be conferred only on electors; that it was not intended to impart political rights and official privileges to aliens, strangers, and non-residents, this intention would have been expressed clearly, and not left to be gathered from general words, or from incidents which

do not imply it. The clear and manifest authority of law alone could empower and sanction it."

State vs. McMillen, 23 Neb. 385; 36 N. W. 387.

For the purposes of the case at bar, Sandoval is to be considered as a non-resident of Bernalillo County. The demurrer to the answer alleging this fact was sustained, and the Court also refused to allow the fact of his non-residence to be shown on the trial. (Transcript, page 29, case No. 116.) This is assigned as error. (Transcript, page 61.)

VII.

The Territorial Legislature Had the Power to Declare Such a Vacancy, Irrespective of the Question of Sandoval's Residence.

Section 1857 of the Rev. Stat. U. S. provides: "All county officers shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory," and by the Organic Act of the Territory of New Mexico, (Sec. 1851 Rev. Stat. U. S.) the legislative power extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. It seems clear that the legislature had the power to create the office of assessor in each county and provide for filling the same by election, appoint-

ment or in any other method it saw fit. The power to create carries with it the power to destroy, and the power to give the power to take away.

It was contended in the courts below that this act of the legislature was forbidden by the "Springer Act," (Act July 30, 1886) prohibiting the legislature of a territory from "granting to any corporation, association or individual, any special or exclusive privilege, immunity or franchise whatever."

A public office is not a franchise, nor is it a privilege or immunity.

"A public office is the right, authority and duty created and conferred by law, which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public."

Meechem on Public Officers, Sec. 1.

Privileges and immunities are thus defined in *Campbell vs. Morris*, 3 Har. & M. (Md.) 535:

"It seems agreed, from the manner of expounding or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding office, the right of being elected. The

Court are of the opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of all the citizens of the state is protected. It means that such property shall not be liable to any taxes or burdens which the property of the citizen is not subject to."

Nor can franchise be construed to mean a public office under any definition to be found in the books.

The Supreme Court of the United States has defined a franchise as a "special privilege conferred by the government upon an individual or corporation, which does not belong to the citizens of the country generally by common right," and this definition has been followed in a large number of cases.

14 Am. & Eng. Ency. of Law, 4.

"It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the state."

Bank of Augusta vs. Earle, 13 Peters, 505.

"It is essential to a franchise that it should be a grant from the sovereign authority." 14

Am. & Eng. Ency. cites a large number of definitions of a "franchise." The term is used with more or less varying significance but none of them fit the definition of a public office—"A special or exclusive privilege as used in this statute almost synonymous with franchise."

The word "privilege" in a statute is to be given the meaning it has in common use, unless there are very strong reasons to the contrary.

Tennessee vs. Whitworth, 111 U.S. 136.

The words "privileges and immunities" are in the XIV Amendment to the Constitution of the United States, also in Section 2, Article 4, with reference to right and immunities of citizens of each state in the several states.

It cannot be contended that the appointment of a citizen to a public office is "granting to him any special or exclusive privilege or immunity, or franchise."

None of these terms aptly designate a public office. They relate to some peculiar benefit or advantage granted to the individual or corporation which all citizens alike do not enjoy—and that benefit or advantage is personal or peculiar. The advantages or benefits have no connection with and are not dependent upon the discharge of any public duty or agency although it may happen that in the case of a corporation—it owes duties to the public, as a common carrier. As to these exclusive privileges

and franchises, the common carrier is a private corporation.

Definition of a "public office." A public office is a charge or trust conferred by public authority for a special purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power.

*See the different definitions collected in
21 Am. & Eng. Ency. (2 Ed.) 322.*

A public officer, under our system, is a servant, an agency of the sovereign—the people—the idea that he holds for "the benefit of the public" is fundamental. His office is not a franchise or privilege granted to him by the sovereign for his own private advantage. His emoluments are supposed to be compensation for his services, nothing else and no more.

If Congress, when it passed the Act of 1886, had intended to prohibit the legislature from appointing county officers, or providing for their appointment in connection with acts clearly within its powers, by special act, it certainly would have inserted in the law some plain apt words to have accomplished that result. It had before it the provisions of the organic act providing "That all township, district and county officers, not otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and Legislative Assembly of the Territory of New Mexico."

Now, if Congress wished to restrict this pow-

er of providing for the election or appointment of those officers by a special act of the legislature, it would have been an easy and natural thing to have inserted a clause in the act, the meaning of which would have been plain and unmistakable. It would have done so. Congress was well aware of the decisions of the courts, that the territorial legislature was vested with plenary powers of legislation, except as restricted by the Constitution and Acts of Congress.

Trustees vs. State of Indiana, 14 How.
273.

Clinton vs. Englebrecht, 13 Wallace
446.

Conley's Constitution Limitations, 34
Note.

Guild vs. First National Bank, 53 N.
W., 504.

See especially *Note to Clinton vs. En-
glebrecht*, 13 Wallace, 434.

Baca vs. Perez, 8 N. M. 187.

The very wording of the clause under consideration shows what Congress intended—it prohibits the conferring upon "any corporation, association or individual any special or exclusive privilege, immunity or franchise." Congress had in view special charter—licenses—exceptions—etc., conferred upon corporation and individuals by grants from the crown in England in the past centuries, and in America, in the states and territories by the legislature. A cor-

poration cannot hold a "public office"—neither can an association—a franchise, etc., might be given to an individual in name and a corporation use it.

To hold this clause to apply to a public office is to hold that every time the governor fills a vacancy in a county office, he grants "a special or exclusive privilege, immunity or franchise." Will it be contended that such a grant by the legislative assembly and the governor, acting jointly, is more to be deprecated and prohibited than the same act by the governor alone? The argument is stronger against the latter as a matter of public policy. We submit there is nothing in this contention.

VIII.

The Acts Creating Sandoval County Went Into Effect From the Date of Their Passage, so far as the County of Bernalillo and the Offices Affected Thereby were Concerned.

It was contended in the courts below that the act did not go into effect until April 14, 1903, and that therefore no officer could be appointed to the vacancy until that time. This contention is not tenable. It is true that the first act, Section 16, provided that it should not go into effect until the fourteenth day of April, 1903, as to certain things mentioned in said sec-

tion, but the act in amendment thereof, authorizing the appointment of the assessor and probate judge of Bernalillo County, expressly provided that Gutierrez and Sanchez, named in the amendment as county commissioners of Bernalillo County, should qualify as such county commissioners on or before the fifth day of April, 1903, and that they should hold a meeting not later than the tenth day of April, 1903, and appoint a judge and an assessor.

The two acts are to be read together, as providing the method and machinery for establishing the new County of Sandoval and regulating the affairs of the old County of Bernalillo as constituted by the passage of the act and effected thereby. Section 16 of the act as first passed merely provided when the new officers should assume their duties. The act expressly went into effect from and after the date of its passage. The act amendatory thereof took effect from and after the date of its passage, and fixed the time for the board of county commissioners to meet and make the appointments, authorizing them to do at any time not later than the tenth day of April, 1903. The board did actually meet and make the appointments on the twenty-third day of March, 1903. This was strictly within the time limited in the act and in accordance with the provisions of the act.

IX.

The Appointment of Plaintiff in Error Albright to the Office of Assessor Was Legal, and No Recovery Could be Had Against Him for the Fees and Emoluments by Sandoval.

At the time of the appointment of plaintiff in error, Albright, to the office of assessor of Bernalillo County by Gutierrez and Sanchez, the said Gutierrez and Sanchez were *de facto* commissioners of Bernalillo County and their title to said offices cannot be collaterally attached in this case.

The general rule is that the acts of a *de facto* public officer are valid so far as they concern the public or third persons who have an interest in the things done, and that such acts cannot be collaterally attached.

8 Am. & Eng. Ency. of Law, 815 and cases cited.

Hussy vs. Smith, 99 U. S. 20.

McDowell vs. U. S., 159 U. S. 601.

Nojire vs. U. S., 164 U. S. 661.

Ball vs. U. S., 140 U. S. 125.

Norton vs. Shelly Co., 118 U. S. 425.

Insurance Co. vs. Seaman, 80 Federal Rep. 357.

The appointment of Albright as assessor of Bernalillo County was strictly in accordance with the acts of the legislative assembly, and these acts being valid, a vacancy existing in the

office of assessor of Bernalillo County by virtue of such acts, the legislature had the power to prescribe in what manner such vacancy should be filled. His appointment being legal, Sandoval cannot recover. Sandoval must recover upon the strength of his own title to the office, which became vacant by reason of the creation of the County of Sandoval, and Sandoval becoming a resident of such new county.

X.

THE CROSS APPEAL.

The defendant in error and appellee, Sandoval, sued out a cross appeal, to bring up the question of his right to recover the full amount of the fees and emoluments, regardless of the amount paid out by Albright while occupying the office, for expenses incurred by him in the conduct of the office during the time it was conducted by him. It is not contended that the amount paid for deputy hire, expenses, etc., were unjust or excessive. To have allowed Sandoval to recover the full amount of the fees and emoluments, without deducting the amount paid for deputy hire, expenses, etc., would give him the gross receipts of the office, more than he would have received had he remained in office and conducted it himself.

In considering the cross-appeal of the defendant in error, case No. 117, we desire to call attention to the fact that no Assignment of Er-

rors was filed by Sandoval with his petition for writ of error with the clerk in the court below and transmitted with the transcript, as provided by Rule 35 of this Court, and by reason thereof, the writ of error should not have been allowed, nor should the cross-appeal be considered by this Court.

The acts of the legislature providing for the appointment of an assessor for Bernalillo County, and the testimony of Albright as to his appointment and that he entered upon the office under the advice of counsel were before the Court when the Court directed the jury to allow the set-off, and the good faith of Albright in occupying the office cannot be questioned. The question of good faith seems to be the controlling factor for the allowance of expenses to an ousted *de facto* officer, and the rule would doubtless not be invoked in favor of an intruder entering in bad faith and without color of right.

The weight of authority is to the effect that a *de jure* officer may recover from the *de facto* officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the *de facto* officer entered into the office in good faith and under color of title.

21 Am. & Eng. Ency. of Law, 403,
404.

Mayfield vs. Moore, 5: Ill. 428; 5 Am.
Rep. 52.

In re Havird, 2 Idaho 252.

Chowling vs. Boyer, (Texas) 9 Am. & Enc. Cor. Cases 91.

Atchison vs. Lucas, 84 Ky. 451.

Arris vs. Stukely, 2 Mod. (Eng. K. B.) 260.

Bier vs. Garrell, 30 W. Va. 95.

There are, however, some well considered cases, holding that no recovery can be had for services not actually performed on, what seems to us to be the correct theory, that there is no property in an office. The leading case being *Stuhr vs. Curran*, 15 Vroom (N. J. Law) 181, 43 Am. Rep. 353.

See also Auditor of Wayne Co. vs. Benoit, 4 Am. Rep. 382.

This Court has held that there is no such thing as property in a public office, see

Taylor vs. Beckham, 178 U. S. 548.

Butler vs. Com. of Penn., 10 How. 204, 14 L. Ed. 442.

The case of *U. S. vs. Addison*, 6 Wall. 294, 18 L. Ed. 919, is not authority to the contrary. In that case a bond had been given by Addison to supersede the judgment of ouster and conditioned for the payment of the loss which the relator might sustain, and the court merely held that the salary during the period of delay caused by the supersedeas was the measure of damages on the supersedeas bond. The question of the expenses of conducting the office was not raised.

XI.

CASE No. 336, OCTOBER TERM, 1908.

The motion filed by appellee, Sandoval, in Case No. 336, October Term, 1908, to dismiss upon the ground that \$5,000 was not involved, should be dismissed, and this case should be determined upon the legal principles involved in Case No. 116, October Term, 1909.

The pleadings in both cases are practically the same, and the answer raises the constitutionality of the acts of the legislature creating Sandoval County, hereinbefore discussed. Upon the question of this Court entertaining jurisdiction of cases involving the constitutionality of acts of territorial legislatures, this Court in the recent case of *New Mexico ex rel. McLean vs. Denver & Rio Grande Railroad Company*, 203 U. S. p. 38, in passing upon a motion to dismiss for lack of jurisdiction, thoroughly discussed the proposition. In this case the Court says:

“Confessedly, \$5,000 is not involved; and in order to be appealable to this Court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This Court, in the case of *United States vs. Lynch*, 137 U. S. 280-285, 34 L. Ed. 700-702, laid down the test of the right to appeal under the statute in the following terms:

“The validity of a statute, or the validity of an authority, is drawn in ques-

tion when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.'

'The right to legislate in the territories is conferred, under constitutional authority, by the Congress of the United States, and the passage of a territorial law is the exertion of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the territorial legislature, it is contended by the relators below, appellants here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the territory. In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the territory, as was the fact in *Snow vs. United States*, 118 U. S. 346, 30 L. Ed. 207. The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject matter of

controversy, and brings the case in this aspect within the second section of the act."

New Mexico ex rel. McLean vs. Denver & Rio Grande Railroad Co., 207 U. S. p. 38.

Here, not only the power of the legislature to pass the acts in question are involved, but it is asserted that they are contrary to the Constitution of the United States, and in conflict with the Act of Congress of 1886, the "Springer Act."

The right of appellant to the office under the legislation of the territorial legislature was claimed as a defense. In legal effect this is clearly within the rule in the case of *Missouri, Kansas & Texas Railroad Co. vs. Haber*, 169 U. S. 613, where it is held that this Court has jurisdiction where defendant claimed certain legislation of Congress furnished a complete defense. The legislation of the Territory of New Mexico is under the power and authority of Congress.

Missouri, K. & Tex. Rd. Co. vs. Haber, 169 U. S. 613.

We submit that the motion filed by appellant to consolidate Case No. 336, October Term, 1908, with the cases No's. 116 and 117, October Term, 1909, should be sustained, and the judgment and determination of the Court in these cases apply to Case No. 336.

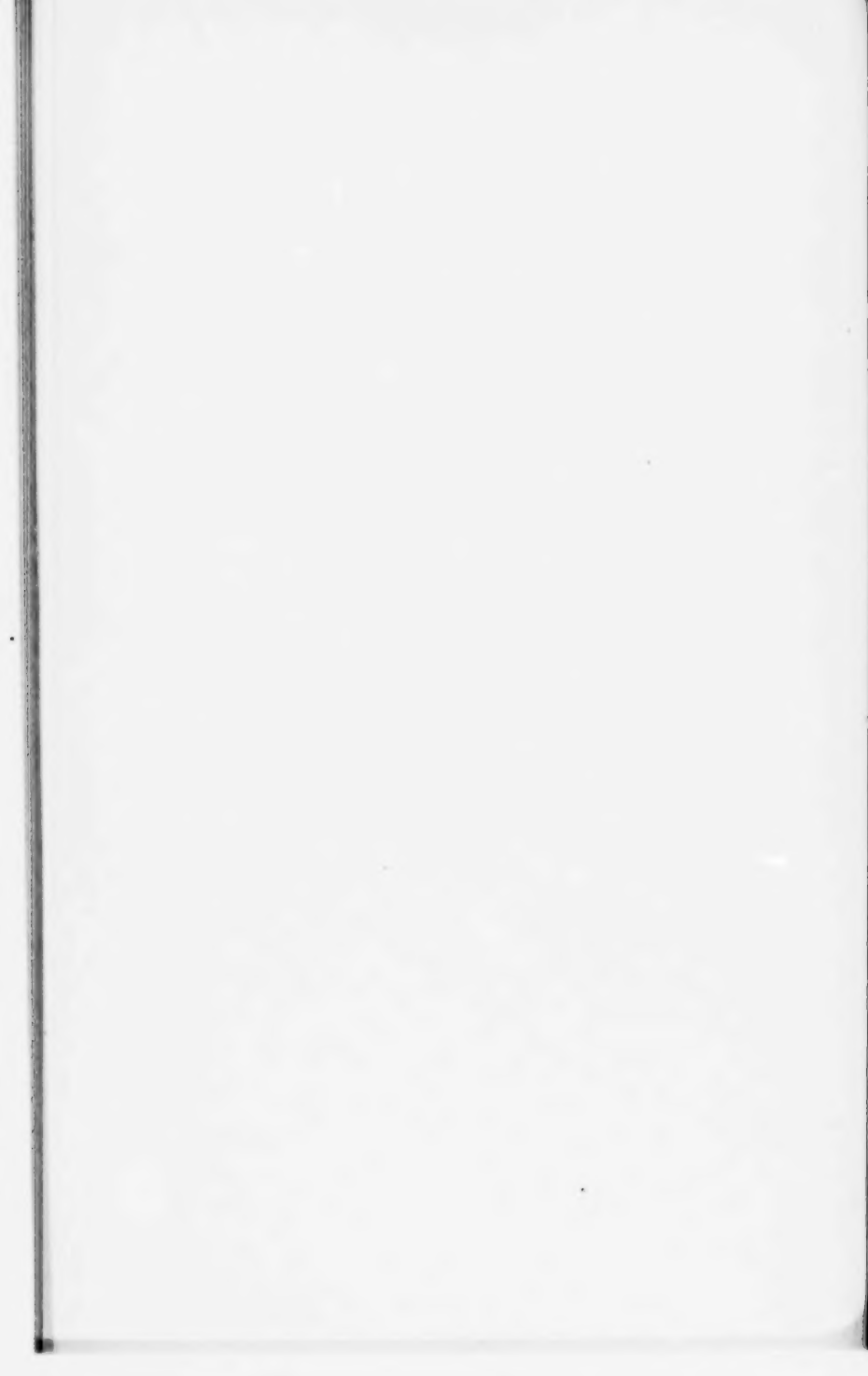
In conclusion, we submit that the act of the

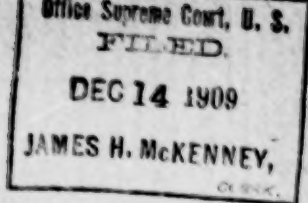
legislature of New Mexico of 1903, creating Sandoval County, and its amendatory act, were clearly within the powers of the legislature and not in conflict with the Acts of Congress, and that all things done under such acts of the legislature were legal, and Albright was entitled to the office of assessor of Bernalillo County, and that he is not liable to the defendant in error for the fees and emoluments. The judgment of the Supreme Court of the Territory of New Mexico should therefore be reversed.

Respectfully submitted,

E. L. MEDLER.

Attorney for Plaintiff in Error, Albright.





BRIEF FOR SANDOVAL.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, A. D. 1909.

GEORGE F. ALBRIGHT,
Plaintiff in Error.

vs.

No. 116.

JESUS MARIA SANDOVAL.

JESUS MARIA SANDOVAL,
Plaintiff in Error.

vs.

No. 117.

GEORGE F. ALBRIGHT.

GEORGE F. ALBRIGHT,
Appellant,

vs.

No. 118.

JESUS MARIA SANDOVAL.

NEILL B. FIELD,
Albuquerque, New Mexico,
Counsel for Sandoval.

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GEORGE F. ALBRIGHT,
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JESUS MARIA SANDOVAL.

BRIEF FOR SANDOVAL.

STATEMENT OF THE CASES.

On the fourth day of November, 1902, Jesus Maria Sandoval was duly elected to the office of assessor of Bernalillo county for the term of two years from the

first day of January, 1903. (Transcript in No. 116, p. 9.)

At the same election George F. Albright was elected to the legislature of the Territory from the same county for a like term of two years. (Ibid, 26-27.)

The legislature, of which Albright was a member, created the county of Sandoval by cutting off a portion of the territory previously embraced in the county of Bernalillo, and provided for the appointment of an assessor for Bernalillo county upon the theory, apparently, that the legal effect of the passage of the act creating Sandoval county made vacant the office of assessor and other county offices, because, as it was claimed, the then incumbent of the office of assessor, as well as the incumbents of other offices, resided in that portion of Bernalillo county which had been created into the county of Sandoval. Albright was appointed to the office of assessor of Bernalillo county before his term as a member of the legislature expired, qualified, and took possession of the office of assessor on the twenty-seventh day of March, 1903, eighteen days before the act creating Sandoval county took effect, and continued to exercise the duties of the office, and to receive the emoluments until the nineteenth day of November, 1904, when, by a judgment of the district court of Bernalillo county, he was ousted therefrom in a proceeding by *quo warranto* instituted by the solicitor general of the Territory on the relation of Sandoval. In the *quo warranto* proceeding, Albright set up title in himself to the office of assessor by way of answer to the information, and a demurrer to the answer hav-

ing been overruled, judgment in favor of Albright was entered by the district court. This judgment was carried on appeal to the supreme court of the Territory and was there reversed. (Territory ex. rel. Sandoval vs. Albright, 78 Pac. 204.)

On that appeal the supreme court of the Territory held that the act creating the county of Sandoval did not render vacant the office of assessor of Bernalillo county, therefore the appointment of Albright was illegal, and remanded the case with directions to sustain the demurrer to the answer of Albright and proceed in accordance with the opinion rendered.

"Upon the presentation of the mandate to the district court, Sandoval moved the court to enter final judgment of ouster and for costs, which motion the court denied, but ordered the cause reinstated, vacated the judgment formerly entered in favor of respondent Albright, and sustained the demurrer of the relator to the respondent's answer, with leave to the respondent to file an amended answer. This was done by respondent, and thereupon relator moved for judgment on the pleadings, which motion was sustained and final judgment entered declaring the respondent not entitled to the office in controversy, and adjudging costs in favor of the relator." (Albright vs. Territory ex. rel. Sandoval, 79 Pac. 719.)

The judgment then rendered was again carried on appeal to the supreme court of New Mexico, and was modified by that court and affirmed. (Ibid.)

This last judgment was brought by Albright on appeal to this court, which appeal was here dismissed

for want of jurisdiction. (Albright vs. Territory ex. rel. Sandoval, 200 U. S. 9.)

On the twenty-sixth day of December, 1904, Sandoval commenced the action which is here as No. 116 of the present term for the recovery of the emoluments of the office received by Albright during his incumbency between the twenty-seventh day of March, 1903, and the nineteenth day of November, 1904, alleging the amount of such emoluments to be six thousand one hundred and eighty-four 16-100 dollars (\$6,184.16). Albright demurred to the complaint, and his demurrer being overruled, answered, admitting that between the dates named in the complaint he had received six thousand six hundred and forty-eight 80-100 dollars (\$6,648.80) on account of the fees and emoluments of the office and denied that he had received any further sum. He also alleged that out of the sum so received during the said period, he had paid two thousand one hundred and forty-two dollars 25-100 (\$2,142.25) for clerical and other expenses necessarily incurred in administering said office, which amount he claimed as a set off against any demands which the plaintiff might have against him for fees and emoluments. He also claimed title to the office under the act creating Sandoval county. (Transcript, 10-11.)

Sandoval demurred to the answer as a whole, and to the several paragraphs of the said answer, (Transcript, 12-13) which demurrer was sustained as to the first, second, third, fourth and fifth grounds, and was overruled as to the sixth, seventh and eighth grounds. (Transcript, 15.) Sandoval replied to so much of the

answer as remained, accepting Albright's statement as to the amount of emoluments received by him, and traversing his allegation as to the amount paid out for expenses necessarily incurred in conducting the office. There was a jury trial at the conclusion of which the court of its own motion directed a verdict in favor of Sandoval for five thousand three hundred and sixty 53-100 dollars (\$5,360.53), (Transcript, 15) having declined to direct a verdict for six thousand six hundred and forty-eight 80-100 dollars (\$6,648.80) with accrued interest, to which Sandoval excepted. (Transcript, 21.) Each party moved for a new trial, which motions being overruled, judgment was rendered in favor of Sandoval against Albright for the amount found by the jury in their verdict.

Albright prayed an appeal, and Sandoval prayed a cross appeal, to the supreme court of the Territory, which affirmed the judgment on both the original and cross appeals. (Sandoval vs. Albright, 93 Pac. 717.)

From the judgment of affirmance, each party sued out a writ of error and upon those writs of error cases No. 116 and No. 117 of the present term are here for review.

On his writ of error, Sandoval assigns for error in this court the following:

I.

That the court erred in overruling the sixth, seventh and eighth grounds of the demurrer to the answer.

II.

That the court erred in refusing to direct a verdict

in favor of the plaintiff for six thousand six hundred and forty-eight 80-100 dollars (\$6,648.80) with accrued interest.

III.

That the court erred in allowing defendant credit for the sum of two thousand one hundred and forty-two 25-100 dollars (\$2,142.25).

Which are the same assignments of error upon which his cross appeal was prosecuted in the supreme court of New Mexico. (Transcript, 57-58.)

On the sixteenth day of October, 1906, Sandoval commenced in the same district court of Bernalillo county an action against Albright seeking to recover the sum of one thousand five hundred and sixty-one 88-100 dollars (\$1,561.88), which was received by Albright from the Territorial treasury on the twenty-fifth day of July, 1905, by two warrants, one for one thousand five hundred and nineteen 74-100 dollars (\$1,519.74), the other for forty-two 14-100 dollars (\$42.14). (Transcript in case No. 118, p. 1.)

This complaint Albright answered on the third day of November, 1906, admitting that he had "received and appropriated to his own use the sum of one thousand five hundred and sixty-one 88-100 dollars (\$1,561.88) of lawful fees and emoluments appertaining to said office of assessor of the county of Bernalillo received from the Territorial treasury, as alleged in paragraph three of said complaint." (Transcript, 5); and by an amended answer set up title to the office under the appointment which had been previously adjudicated against him, and made the entire record of the

quo warranto proceeding a part of his amended answer. (Transcript, 8-29.)

A motion for judgment on the pleadings, which was made after the filing of the original answer, was then renewed and granted; judgment was rendered in favor of Sandoval against Albright for one thousand and eighty-eight 44-100 dollars (\$1,688.44), being the amount which he admitted he had received with interest which had accrued up to the third day of December, 1906, the date on which the judgment was rendered.

This case was carried on appeal to the supreme court of the Territory, and judgment was there affirmed. (Sandoval vs. Albright, 94 Pac. 947.)

From the judgment of affirmance Albright prayed and was granted an appeal to this court, and the same was returnable to the October, 1908, term, where the case was docketed as No. 336 of that term.

At that term Sandoval moved to dismiss the appeal for want of jurisdiction because the amount in controversy was less than five thousand dollars (\$5,000); and Albright moved to consolidate the case with the two previous cases, which were Nos. 334-5 of that term; and this court, while not passing upon the motion to consolidate, postponed the motion to dismiss until the hearing on the merits.

I shall not attempt to add anything to what was said in my brief on the motion to dismiss, but shall assume that the convenience of the court will be furthered by the presentation of the questions involved in these cases

in one brief. Those questions, as a I conceive them to be, are:

I.

Can an officer *de jure*, after judgment in *quo warranto*, recover from a usurper the fees and emoluments of the office usurped?

II.

What is the effect of a judgment in *quo warranto* upon the rights of the parties in such action for fees and emoluments?

III.

What is the extent of the liability of the usurper to the officer *de jure* on account of the fees and emoluments of the office received by him?

POINTS AND AUTHORITIES.

I.

AN OFFICER *DE JURE* MAY MAINTAIN AN ACTION FOR THE RECOVERY OF THE FEES AND EMOLUMENTS OF AN OFFICE AGAINST A PERSON WHO HAS BEEN ADJUDGED IN *QUO WARRANTO* TO BE NOT ENTITLED TO THE OFFICE.

The proposition above stated can scarcely be said to be debatable at this time, although one court of very high authority has held to the contrary. The court of errors and appeals of the State of New Jersey in the case of *Stuhr vs. Curran* (44 N. J. L., 181) in 1882 reached the conclusion, the court being divided seven to five, that one of two candidates for the office of chosen freeholder, who received the certificate of elec-

tion from the board of canvassers, and performed the duties of the office for six months, having no reason to doubt that he was legally elected, was not liable to the man who was really elected for the fees and emoluments received by the former while he was in possession of the office, even though he had been subsequently ousted by that other on *quo warranto*. But so far as I have been able to discover, this case stands practically alone, and the decision of the majority of the court has been repeatedly rejected as authority in other jurisdictions. I can add nothing to the argument advanced by the chief justice, who delivered the opinion of the minority of the court, although many adjudications, both prior and subsequent to that, support the conclusion of the minority, an adjudication by this court being among the number.

This question is elaborately discussed in the opinion of the court below: I, therefore, forbear to cite any other cases as I am persuaded that further citation of authorities would impose unnecessary labor upon the court.

Stuhr vs. Curran, 44 N. J. L., 181.

United States vs. Addison, 6 Wall. 291.

II.

IN A SUIT FOR THE FEES AND EMOLUMENTS OF AN OFFICE A JUDGMENT OF OUSTER BY A COURT OF COMPETENT JURISDICTION IS CONCLUSIVE AS TO THE TITLE TO THE OFFICE.

The judgment of the district court in the *quo war-*

ranto proceeding, which was made part of the complaint in case No. 116, is as follows:

"Wherefore it is considered, ordered, adjudged and decreed by the court that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp the office of assessor of the county of Bernalillo, and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of assessor of the county of Bernalillo, and Territory of New Mexico, as the lawful custodian thereof.

It is further considered, ordered, adjudged and decreed by the court that the relator, Jesus Maria Sandoval, do have and recover of and from the respondent, George F. Albright, his costs in this behalf expended, to be taxed, and may have execution therefor." (Transcript, 6.)

It is true that in affirming the judgment, the supreme court of New Mexico said:

"We are of opinion that the court below, in ordering the respondent to deliver up to the relator the records and other equipments of the assessor's office, added to his judgment in *quo warranto* what would properly have been a judgment on mandamus, had the respondent, after the judgment in *quo warranto*, refused to deliver the office. While, as suggested by relator, the error is one which, in a certain sense, can do the respondent no harm, since, being not entitled to the office himself, it cannot be material to him who

has it, still the effect of the clause in the judgment is to adjudicate something which was not within the issues; and, the point being made, we feel that a proper disposition of the matter is, without remanding the case, to modify the judgment below by striking out the words "and that he forthwith deliver up to the relator the records, books, papers, furniture, and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof." (Albright vs. Territory, 79 Pac. 723.)

And that the judgment was by the supreme court modified by striking out the direction to Albright to deliver up the records, etc., pertaining to the office, but the judgment was affirmed in all other respects, including the adjudication "that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the county of Bernalillo and Territory of New Mexico, *from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office.*" (Transcript, 6.)

The supreme court of the Territory in its opinion, which is made part of the transcript in cases No. 116 and No. 117, said: "The right of office and that the appellee was the *de jure* officer, were fully determined in the former suits, and cannot be considered in this, therefore, the court below, properly sustained the demurrer to all such parts of the answer as sought to raise this issue." (Transcript, 65.)

Again in the opinion, which is made a part of the transcript in case No. 118, that court said: "The power of the county commissioners to appoint Albright to the

office of assessor was decided adversely to him in Territory vs. Albright, (78 Pac. 204; 12 N. M. 293). The eligibility of Sandoval to hold office was decided favorably to Sandoval in the same case." (Transcript, 40-41.)

I have not seen the brief on behalf of Albright in this court, and, as in the court below no argument was offered in support of the contention that Albright's title to the office of assessor was open to inquiry in this case, I am at a loss to understand the theory upon which the contention is based.

There can be no doubt that in the *quo warranto* proceeding the courts of New Mexico had jurisdiction of both person and subject matter; and this court has held that it is without jurisdiction to review the judgment of the supreme court of the Territory in that proceeding. (Albright vs. Sandoval, 200 U. S. 9.)

In the case last cited it was argued on behalf of Albright that this court should take jurisdiction because its refusal to do so would render Albright liable to Sandoval for "all fees and emoluments received by him during the period of deprivation of office by reason of, the fact that Albright had given a supersedeas bond." But this court said in answer to the argument, "the term of office had expired before the rendition of judgment by the Territorial supreme court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in the subsequent action." (Ibid., 212.)

In an early case, this court, speaking by Mr. Justice Field, said, "By the judgment of ouster against Addison, his right to the office of mayor was determined. The relator thereupon became entitled to the office, either by virtue of the declaration of the judges who had returned him elected, or by virtue of that provision of the charter which enacts that the mayor shall hold over until his successor is elected." (*United States vs. Addison*, 6 Wall.297.)

I am unable to perceive any basis for the contention that the judgment in the *quo warranto* proceeding was not equally effective as against Albright.

However, it may be argued, that Sandoval's title was not in issue in the *quo warranto* proceeding. The answer to such an argument is obvious. In the first place, it was essential to a decision in that case that the court should determine whether or not a vacancy existed in the office of assessor of Bernalillo county at the time of Albright's pretended appointment, and the court found and decided that no such vacancy did exist. In the next place, Sandoval's title was never put in issue by Albright in the cases at bar. In each case he alleged in his complaint, his election, qualification, and entry upon the discharge of the duties of the office. (Transcript in case No. 116, p. 4; Transcript in case No. 118, pp. 1-2.) And in each case Albright admitted these allegations. (Transcript in case No. 116, p. 9; Transcript in case No. 119, p. 4.) So that, if it had been competent for Albright to challenge in these cases Sandoval's title to the office, he not only failed to do so, but expressly admitted the facts upon which his right depended.

His contention here is identically the contention he

made in the *quo warranto* proceeding, and he sought to support it by introducing in each of these cases the record of the *quo warranto* proceeding with a view, apparently to obtain a re-examination of the very points which were there decided:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between the parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (*Southern Pacific Railr'd vs. United States*, 168 U. S. 48-49.)

The attempt to obtain in these cases a re-examination of the questions determined in the *quo warranto* proceeding is clearly an attempt to attack collaterally the judgment in that proceeding.

New England Mortgage Co. vs. Gay, 145 U. S. 123;

Washington Railr'd Co. vs. Dist. of Columbia,
146 U. S. 227;

Kimball vs. Kimball, 174 U. S., 158.

While in the supreme court of New Mexico the fourth, fifth, sixth, seventh, eleventh and twelfth assignments of error (Transcript in case No. 116, pp. 56-7) were evidently designed to call in question in that court the effect of the adjudication in the *quo warranto* proceeding, counsel who then represented Albright declined to argue those assignments of error.

As stated before, I have not seen the brief which is to be relied on in this court, and I have, therefore, deemed it wise to present this proposition more elaborately than I should otherwise feel justified in doing.

Albright vs. Sandoval, 200 U. S. 9;

United States vs. Addison, 6 Wall. 297;

Southern Pacific Railr'd Co. vs. United States,
168 U. S. 48-9;

New England Mortgage Co. vs. Gay, 145 U. S.
123;

Washington Railr'd Co. vs. Dist. of Columbia,
146 U. S. 227;

Kimball vs. Kimball, 174 U. S., 158.

III.

WHAT IS THE EXTENT OF THE LIABILITY OF ALBRIGHT TO SANDOVAL, ON ACCOUNT OF THE FEES AND EMOLUMENTS OF THE OFFICE, RECEIVED BY HIM?

This is the single question which is presented by Sandoval's writ of error in case No. 117, and the answer to it is, as I concede, not free from difficulty. The question is one of first impression in this court, and I at least, have been able to find little in the adjudged

cases which can be said to be really helpful to its solution. The courts of those jurisdictions where the point has been adjudicated seem to me to have been influenced more by considerations of supposed hardship to individuals than by fixed legal principles. All courts appear to agree that if the usurper enters in bad faith, he must account to the officer *de jure* for the gross receipts of the office, but in a majority of the cases, it is held that if the usurpation is in good faith, and under an honest belief that the usurper has title, he should be allowed credit for the expenses necessarily incurred in conducting the office, and must account for only the "net profits" after deducting such reasonable expenses as he may have incurred. This conclusion, as it seems to me, loses sight of two elementary legal principles which are established beyond dispute, and which should, in my opinion, be controlling.

It is no answer to a suit for the invasion of a legal right that the intruder acted under a mistake of law.

In contemplation of law there are no profits attached to any public office because the fees and emoluments are conclusively presumed to be no more than adequate remuneration for the discharge of the duties of the office.

Why the intruder should be entitled to recoup the money expended in procuring the service of assistants, and not compensated for his own time and labor is, as it seems to me, logically inexplicable upon any conceivable legal principle. If he is entitled to withhold the reasonable value of the services of his assistants, it must be because those services have enured to the

benefit of the holder of the legal title, but his own services equally enure to the benefit of the holder of the legal title, and the equity in one case seems quite as strong as in the other.

Perhaps a usurping jailor, who is allowed to deduct from the amount received for feeding prisoners the original cost to himself of the food consumed, is in a different attitude from that of the purchaser of timber who buys from a willful trespasser who has bestowed his labor upon it, thereby increasing its value—but his legal liability does not necessarily depend upon different legal principles. It may be that the law contemplates that a "profit" may be derived from the discharge of such an official function, and that the allowance for board of prisoners includes as well compensation for the official responsibility for their safe custody; and if that be true, it would seem to be not illogical to require such jail or to account for only that part of the compensation which is allowed for such responsibility. There would seem to be no logical obstacle to such a distinction, if the courts are authorized to assume that so much of the compensation for board as is in excess of the actual cost of the food furnished is allowed on account of the official responsibility for safe custody.

It may even be true that the same principle would justify the deduction of the cost of books, stationery, postage and the like, necessarily expended in conducting the office in question; but I respectfully submit that it is not necessary to a decision of this case that this court shall decide that an allowance for such expendi-

tures would or would not be proper, because it affirmatively appears from the testimony of Albright that the amount for which he was allowed credit was made up of the sums paid to outside deputies and assistants in making up the rolls and the regular clerk hire of the office. (Transcript, 24-5.)

Probably the leading case in this country in support of the doctrine against which I contend is *Mayfield vs. Moore* (53. 111. 428), in which the court likens such an action to a bill for an accounting as between principal and agent, but, it seems to me, that the analogy upon which that court relies is utterly lacking.

I also think that this court has impliedly repudiated the applicability of the doctrine of the right to an equitable set off in such cases.

"The rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical." (*United States vs. Addison*, 6 Wall. 298.)

If this court shall be unable to agree with my contention that the good faith of Albright was not a proper subject of inquiry and is of opinion that the measure of damages was properly affected by that inquiry, attention is invited to the following undisputed facts which

I submit are sufficient to show, as a matter of law, that Albright did not act in good faith.

He was a member of the legislature which passed the act creating the county of Sandoval. The organic act of the Territory provides:

"That no member of the legislative assembly shall hold, or be appointed to, any office which shall have been created, or the salary or emoluments of which shall have been increased while he was a member, during the term for which he was elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, except postmasters, shall be a member of the legislative assembly, or shall hold any office under the government of said territory." (9 Stat. 446.)

446.)

He took possession of the office on the twenty-seventh of March, 1903, eighteen days before the act creating Sandoval county took effect. The *quo warranto* proceeding was commenced by the solicitor general on the relation of Sandoval on the twentieth day of July, 1903, and on the twenty-third of that month he filed an answer in which he set up that the office to which he had been appointed "was in effect a new office." (Transcript, 46.) This answer was demurred to on the twenty-fourth of July, 1903, and, among other grounds of demurrer assigned, was: "Because the respondent, George F. Albright, was and is ineligible to the said office if it is a new office, as alleged in said answer, as this court will take judicial notice of the fact that he is a member of the legislative council which passed said acts, and as such is incompetent to

hold any office created by said council." (Ibid.) Immediately upon the filing of this demurrer, he was granted leave to amend his sworn answer by striking out the allegation that it "was in effect a new office."

(Although in the answer, as printed in the transcript, this allegation, which was contained in the paragraph at folio seventy-two of the transcript, does not appear, it does sufficiently appear by the transcript that the answer did contain such an allegation, and that the same was stricken out by leave of the court.)

Possession of the office was obtained from the deputy of Sandoval, who turned it over to Albright on the order of the board of county commissioners, (Transcript 27) and the deputy who turned over the office to Albright was employed by him as his deputy within two or three weeks after he got possession of the office.

As against these undisputed facts, and as evidence of his good faith, he alleges that he acted under the advice of counsel, and the record shows that the district court held with him by overruling the demurrer to his answer as amended, and that the adjudication contrary to his contention was first made by the supreme court on the thirteenth day of September, 1904. (Transcript, 47.) The mandate came down on the nineteenth of October, and on the twenty-fifth of that month, Albright asked and obtained leave to file an amended answer on or before the fifth of November, 1904. (Transcript, 48.) On the last named day he filed what was called an amended answer, but which in fact contained no new allegation, and although a motion for judgment on the

pleadings was promptly interposed, he succeeded in preventing the entry of judgment until the nineteenth of November, 1904; since which time he has stubbornly contested in every court to which he has had access the right of Sandoval to recover any part of the fees and emoluments of the office.

While it may be generally true that courts will not impute bad faith to a litigant who merely awaits the determination of a court of last resort as to his legal rights, and insists upon having that determination, it is certainly true that where he is a wrongdoer "presumptions between him and the person wronged should be made in favor of the latter." (*Costigan vs. Railroad Co.*, 2 Denio 609.)

It should be borne in mind that it is not sought to recover from Albright any more than he has confessedly received without legal right. He did not inadvertently intrude into the office of assessor of Bernalillo county, but sought under a void act of the legislature of which he was a member, to deprive Sandoval of an office to which he had been elected by the people. It is true that his conduct does not appear to have created in the mind of the judge who tried the case below, or of the members of the supreme court of the Territory, the impression that he was blameworthy, and it may be that this court should hesitate to disturb the ruling of the lower court, concurred in by the supreme court of the Territory, unless convinced that it was based upon an erroneous legal principle, and that the court will be justified in affirming the judgment in case No. 117 without inquiring into the question of Albright's good

faith, if that were a proper subject of inquiry in the courts below. I respectfully submit that the question is of great importance, and should be determined according to legal principles in such manner as will best protect the public interests and offer the least encouragement to those who may be inclined to intrude into public office under a doubtful right.

If Albright was acting in good faith, he might, and it seems to me he should, have pursued his remedy by *quo warranto*, leaving Sandoval in possession of the office until the right had been judicially determined. Had he pursued that course, there would have been no interruption of the public business, and no loss to himself, except the expenses of the litigation to test his title. Accepting appointment before the law under which he claimed took effect, he saw fit to take possession of the office in advance of the time when it could reasonably be claimed to be vacant, from a deputy, not from Sandoval, and to hold throughout almost the entire term without lawful right.

If the office had been one to which a salary was attached the cases are agreed that he would have been compelled to account for the entire amount of the salary: no sound distinction, in principle, justifies an accounting by him on any other basis in the case at bar.

The reasoning of this court in *Woodenware Co. vs. United States* (106 U. S., 432) seems to me to be applicable here, and that it would be a perversion of the principle there announced to permit Albright to escape any part of his liability on the ground that the wrong

committed by him was done unintentionally or in advertently.

I cite such cases as I have been able to examine, and some to which I have not had access because the books are not available.

Mayfield vs. Moore, 53. 111. 428.

Beard vs. City of Decatur, 7 *Am. & Eng. Cor. Cases* 145.

Chowning vs. Boger, 9 *Am. & En. Cor. Cases* 91.

Atchison vs. Lucas, 83 *Ky.* 451.

Arris vs. Stukely, 2 *Mod.* 260.

Bier vs. Gorrell, 30 *W. Va.* 95.

Nichols vs. MacLean, 101 *N. Y.* 526.

Kiertz vs. Dehrensneyer, 149. 111. 496.

3 *Sutherland Damages*, 3rd Ed., Sec. 693.

United States vs. Addison, 6 *Wall.* 291.

Woodenware Co. vs. United States, 106 *U. S.* 432.

Michel vs. New Orleans, 32 *La. Ann.* 1094.

The suggestion is made on the motion to consolidate these cases that Sandoval appears to have split his causes of action against Albright, but attention is called to the fact that the first action was commenced on the twenty-sixth day of December, 1904, while the demand sued for in the second action (No. 118 here) did not accrue to Sandoval until the twenty-fifth day of July, 1905, when Albright received the money sued for in that action from the territorial treasury; besides no point was made in either of the courts below that separate causes of action were not properly maintained in the premises.

I respectfully submit that in case No. 116, the judg-

ment of the court below should be affirmed; that in case No. 117, the judgment of the court below should be reversed, and the case should be remanded with direction to enter judgment in favor of Sandoval against the plaintiff in the main case in the supreme court of the territory for the full amount for which a verdict should have been directed in the first instance; and that in case No. 118, the appeal should be dismissed, with costs, for want of jurisdiction.

NEILL B. FIELD,

Counsel for Sandoval.

Office Supreme Court, U. S.
FILED.

OCT 12 1908

JAMES H. McKENNEY,

CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1908

No. **118.**

GEORGE F. ALBRIGHT,

Appellant,

vs.

JESUS MARIA SANDOVAL,

Appellee.

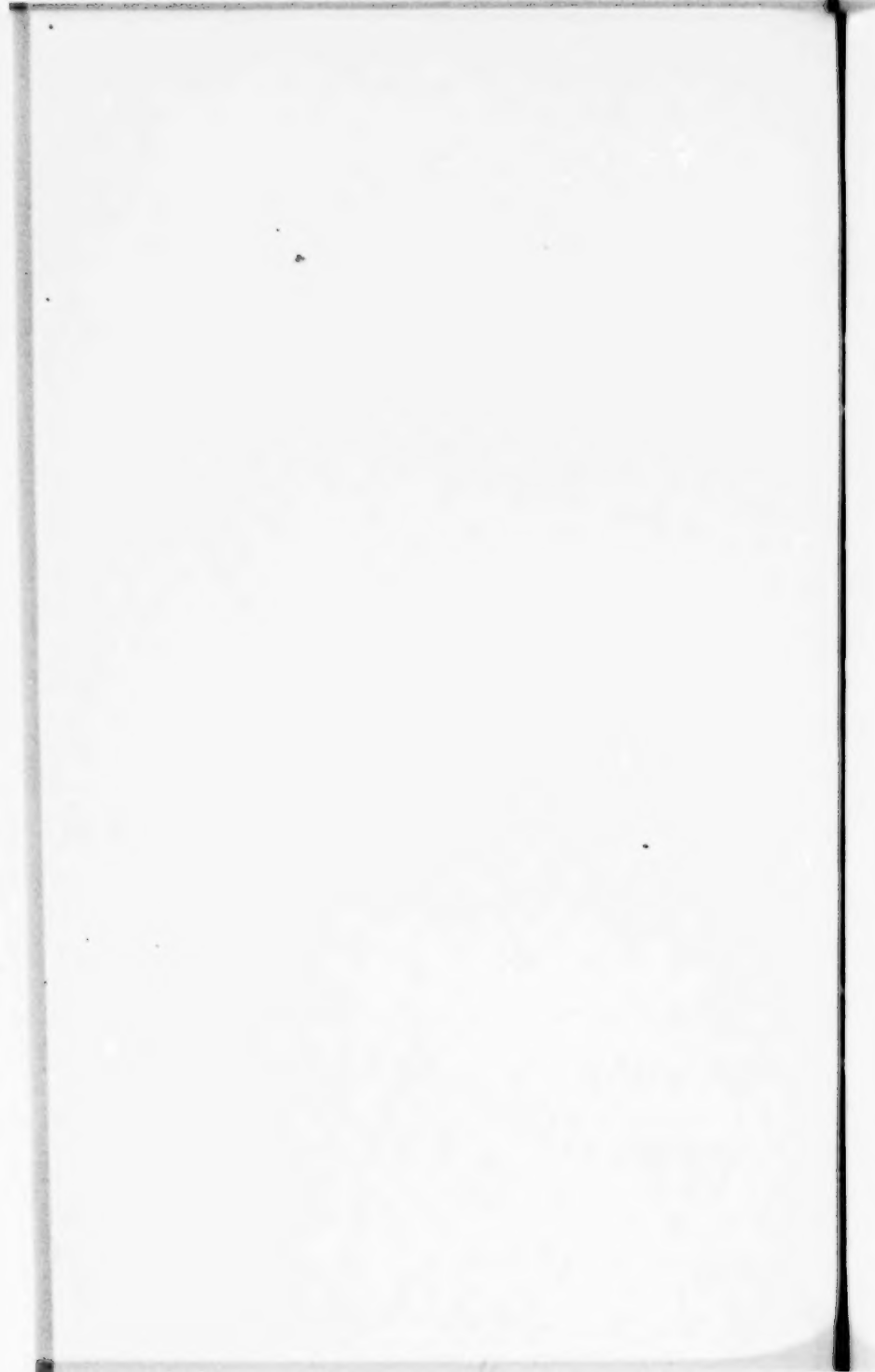
APPEAL FROM SUPREME COURT
OF NEW MEXICO.

BRIEF OF APPELLANT ON MOTION TO
DISMISS APPEAL.

E. L. MEDLER,

Counsel for Appellant

Albuquerque, New Mexico.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1908

No. 336.

GEORGE F. ALBRIGHT,

Appellant,

vs.

JESUS MARIA SANDOVAL,

Appellee.

**BRIEF OF APPELLANT ON MOTION TO
DISMISS APPEAL.**

The act of March 3rd, 1885, Ch. 355, 23 St. Lg. 443, (4 Fed. St. Ann. 463) allows appeals to this Court from any judgment of the Supreme Court of a Territory where the matter in dispute, exclusive of costs, exceeds \$5,000; and also, by Sec. 2, in cases wherein is involved the validity of a treaty or statute of or authority exercised under the United States, without regard to the sum or value in dispute. While the judgment against the appellant in the Court below was

for the sum of \$1,688.54, which included interest to date of judgment, yet the real amount in dispute between the appellant and appellee growing out of the transactions involved in this case and the principles of law applicable thereto is in excess of \$7,000, and this case is properly within both sections of the Act of March 3rd, 1885 allowing appeals to this Court from the Supreme Courts of Territories.

In making appellant's position clear, it is necessary to review briefly the history of the litigation involved in the present case. At the general election held on November 4th, 1902, the appellee Sandoval was elected assessor of Bernalillo County, New Mexico, and within the time allowed by law qualified and entered upon the discharge of the duties of the office.

The Legislative Assembly of the Territory of New Mexico, acting under the powers and authority vested in the Legislative Assembly by virtue of the Organic Act creating the Territory of New Mexico, and the various acts of Congress amendatory or supplemental thereto, at its session of 1903 passed an Act creating the County of Sandoval from a portion of Bernalillo County. (Chap. 27 Laws of N. M., 1903, page 38.) Later in the session an amendatory Act was passed, providing as follows:

"Section 1. That section 3 of the act to create the county of Sandoval, approved on March 10th, 1903, be and the same is hereby amended so as to read as follows:

"Sec. 3. That T. C. Gutierrez, to fill the unexpired term of the second district, and Severo Sanchez, be and they hereby are appointed and constituted county commissioners for the county of Bernalillo, as the same is constituted after the creation of Sandoval county, and the said T. C. Gutierrez and Severo Sanchez shall qualify as said county commissioners on or before the fifth day of April, 1903, and shall together with the county commissioner now in office for the said county of Bernalillo, hold a meeting not later than the tenth day of April, 1903, and said three persons as a board of county commissioners for Bernalillo county shall appoint one assessor and one probate judge for the said county of Bernalillo to serve until their successors are elected and qualified at the next general election."

Chap. 49, Laws of N. M. 1903 p. 80.

Under the power vested in the Board of County Commissioners of Bernalillo County by § 3 above quoted, the appellant, Geo F. Albright, was appointed assessor of Bernalillo County as constituted after the passage of the above legislation, and immediately took possession of the office and performed the duties thereof. Thereafter, at the instance of the appellee, warranto proceedings were begun against Albright to test his right to hold the office, and these proceedings resulted in a judgment of affirmance by the Supreme Court of the Territory in January, 1905 a short time after the term of Albright had expired.

Albright v. Territory 79 Pacific Rep. 719.

An appeal was taken from this judgment of

ouster to this court, which on motion was dismissed, upon the ground that,

"The liability to a fine on a judgment of ouster in quo warranto proceedings, or the possible effect of such judgment in subsequent litigation over the emoluments of the office, does not make the matter in dispute in the quo warranto proceedings after the term of office has expired measurable by some sum or value in money, and thus bring the judgment within the scope of the provisions of the act of March 3, 1885 (23 stat. at L. 443, Chap. 355, U. S. Comp. Stat. 1901, p. 572), for appeals from the the Territorial Supreme Courts to the Supreme Court of the United States." (Quoting from *Syllabus*.)

While the appeal was pending before the Territorial Supreme Court in the quo warranto proceedings, the appellee herein, Jesus M. Sandoval, on December 26, 1904, filed a suit against the appellant George F. Albright, in the District Court of Bernalillo County, New Mexico, to recover \$6,184.16, alleged to be the lawful fees and emoluments received by Albright from March 27th, 1903 to Nov. 19, 1904 pertaining to the office of assessor of Bernalillo County. In this suit a judgment was rendered against appellant Albright for \$5,360.53. An appeal was taken to the Supreme Court of the Territory, and the judgment affirmed in that court, January 13, 1908.

Sandoval v. Albright, 93 Pacific, Rep. 717.

From this judgment of affirmance in the Supreme Court of the Territory, an appeal has been

sued out to this Court, and the case is now pending in this Court numbered 334 and 335 on the calendar of this term.

The appellee, Jesus M. Sandoval, after the filing of the above suit to recover the emoluments of the office, on October 16th 1906, filed another suit in the District Court of Bernalillo County, to recover additional emoluments of the office, in the sum of \$1,561.88. A judgment having been rendered against the appellant, an appeal was taken to the Supreme Court of the Territory of New Mexico, and this judgment likewise affirmed. *Sandoval v. Albright*, 94 Pacific Rep. 947. From the judgment in the Supreme Court of the Territory, an appeal was likewise taken to this Court, and is the case now before the Court numbered 336 of the October 1908 term. An inspection of the record in this case, as well as No. 334-5, will show that the complaint in paragraph II contains the following allegations:

" * * * that on the twenty-seventh day of March, 1903, the defendant, George F. Albright, without authority of law, and in violation of the right of this plaintiff, intruded himself into the said office of assessor of Bernalillo County, New Mexico, and usurped the same, and excluded the plaintiff therefrom until the nineteenth day of November, 1904, when this plaintiff by the consideration and judgment of this honorable court, in a certain proceeding entitled *The Territory of New Mexico, on the relation of Jesus M. Sandoval, against George F. Albright*, was restored to the possession

of said office, copy of which judgment is filed herewith and marked "Exhibit A" and is prayed to be taken and considered as part of this complaint."

The answer of the defendant, **RAISES THE LEGAL PROPOSITION OF THE POWER AND AUTHORITY OF THE TERRITORIAL LEGISLATURE TO PASS THE ACTS** above referred to, creating Sandoval County and to vest the power of appointment in the County Commissioners of Bernalillo County. (Trans. p. 5.) The answer also contains a full record of the quo warranto proceedings, in which the same questions are raised. Upon the issues as thus settled, the Court gave judgment in favor of the plaintiff on a motion for judgment on the pleadings.

Upon the question of this Court entertaining jurisdiction of cases involving the constitutionality of acts of Territorial Legislatures, this Court in the very recent case of *New Mexico ex rel McLean v. Denver & Rio Grande Railroad Co.* 203 U. S. p. 38, in passing upon a motion to dismiss for lack of jurisdiction, says:

An objection is made to the jurisdiction of this court upon the ground that the case is not appealable under the act of Congress of March 3, 1885. 23 Stat. at L. 443, chap. 355 (U. S. Comp. Stat. 1901, p. 572).

Section 1 of the act provides, in substance, that no appeal or writ of error shall be allowed from any judgment or decree of the supreme court of a territory unless the matter in dispute, exclusive of costs, exceeds the sum of \$5,000. Section 2 of the act

makes exception to the application of § 1 as to the sum in dispute, in cases wherein is involved the validity of a treaty or statute of or authority exercised under the United States, and in all such cases an appeal or writ of error will lie without regard to the sum or value in dispute.

Confessedly, \$5,000 is not involved; and in order to be appealable to this court the case must involve the validity of an authority exercised under the United States, and also be a controversy in which some sum or value is involved. This court, in the case of *United States v. Lynch*, 137 U. S. 280-283, 34 L. ed. 700-702, 11 Sup. Ct. Rep. 114-116, laid down the test of the right to appeal under the statute in the following terms:

"The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial form the subject of direct inquiry."

The right to legislate in the territories is conferred under constitutional authority, by the Congress of the United States, and the passage of a territorial law is the exercise of an authority exercised under the United States. While this act was passed in pursuance of the authority given by the United States to the territorial legislature, it is contended by the relators below, appellants here, that it violates the Constitution of the United States, and is therefore invalid, although it is an attempted exercise of power conferred by Congress upon the territory. The objection of the relator to the law raises a controversy as to the right of the legislature to pass it under the broad power of legislation conferred by Congress upon the territory. In other words, the validity of an authority exercised

under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the territory, as was the fact in *Snow v. United States*, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059. The power to pass the act at all, in view of the requirements of the Constitution of the United States, is the subject-matter of controversy, and brings the case in this aspect within the 2d section of the act. (*New Mexico ex rel McLean v. Denver & Rio Grande Railroad Co.*, 203 U. S. p. 38.)

The right of appellant to the office under the legislation of the Territorial Legislature was claimed as a defense. In legal effect this is clearly within the rule in the case of *Missouri, Kansas & Texas Railroad Co. v. Haber*, 169 U. S. 613, where it is held that this Court has jurisdiction where defendant claimed certain legislation of Congress furnished a complete defense. The legislation of the Territory of New Mexico is under the power and authority of Congress.

II.

Appellee's brief is wholly upon the point of the monetary sum involved. While it is true that the judgment in this case, No. 336, is under \$5,000, the legal principles in this case are the same as is involved in case No. 3345, and appellant has filed a motion to consolidate. A decision upon the merits of this case would gov-

ern the court in its judgment in No. 334-5, and we respectfully submit that the issues being the same, and growing out of the same cause of action which it appears seems to have been split, these two causes should be consolidated and the appellant in justice have the benefit of a decision upon the merits.

Respectfully submitted,

E. L. MEDLER,
Attorney for Appellant.



Office of the Clerk, U. S.
FILED.

SEP 26 1908

JAMES H. McKENNEY,

MOTION TO DISMISS APPEAL AND
BRIEF IN SUPPORT OF SAME.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

No. **118.**

GEORGE F. ALBRIGHT,

Appellant,

v/s.

JESUS MARIA SANDOVAL.

Appellee.

APPEAL FROM SUPREME COURT OF
NEW MEXICO.

NEILL B. FIELD,

Counsel for Appellee,

Albuquerque, New Mexico.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1908.

GEORGE F. ALBRIGHT,

Appellant,

vs.

No. 336.

JESUS MARIA SANDOVAL,

Appellee.

NOTICE OF MOTION TO DISMISS APPEAL

TO THE APPELLANT, George F. Albright :

You are hereby notified that the Appellee, J. M. Sandoval, will, on Monday, the 19th day of October, 1908, move the Court to dismiss the above entitled cause for the reasons set forth in the motion, a copy of which is hereto annexed, and you can appear and resist the said motion if you see fit to do so.

NEILL B. FIELD,

Attorney for Appellee.

Service of above notice with copy of motion and brief in support of same acknowledged this 15th day of September, 1908.

GEO. F. ALBRIGHT.

IN THE

Supreme Court of the United StatesOCTOBER TERM, 1908.

GEORGE F. ALBRIGHT,

Appellant,

vs.

No. 336.

JESUS MARIA SANDOVAL,

Appellee.

MOTION TO DISMISS.

Comes now the appellee, J. M. Sandoval, by Neill B. Field, his attorney, and moves the Court to dismiss the appeal in the above entitled cause for want of jurisdiction and for cause of said motion shows to the Court the following, that is to say:

I.

Because it affirmatively appears from the record in this cause that the matter in dispute, exclusive of costs, is less than Five Thousand (\$5,000.00) Dollars.

II.

Because it affirmatively appears from the record in this cause that there is not involved in this cause the validity of any patent or copyright, nor is there drawn

in question therein the validity of a treaty, or statute of, or an authority exercised under the United States.

WHEREFORE, Appellee prays that the said appeal may be dismissed.

NEILL B. FIELD,

Attorney for Appellee.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1908.

GEORGE F. ALBRIGHT,

Appellant,

v.s.

JESUS MARIA SANDOVAL.

**BRIEF OF APPELLEE ON MOTION TO
DISMISS APPEAL.**

This is a suit by Sandoval against Albright to recover One Thousand Five Hundred Sixty-one Dollars and Eight-eight Cents (\$1,561.88), alleged to have been received by Albright from the Treasurer of the Territory of New Mexico as part of the fees and emoluments of the office of Assessor of Bernalillo County, in said Territory. Judgment was rendered in the trial court in favor of Sandoval for One Thousand Six Hundred Eight-eight Dollars and Eighty-four Cents (\$1,688.84), which included interest accrued to date of the judgment.

The Supreme Court of the Territory affirmed the cause, and, reckoning interest to the date of affirmance, entered judgment for One Thousand Eight Hundred

Thirteen Dollars and Twenty-five Cents (\$1,813.25) against the Appellee and his sureties on his superseas bond. To review the latter judgment this appeal is prosecuted. The Appellee has filed a motion to dismiss the appeal under Rule 6.

Judgment was rendered by the trial court in favor of Appellee upon the pleadings, from which it appeared that in a *quo warranto* proceeding, which had been finally determined before the institution of this suit, the title to the office of Assessor of Bernalillo County had been litigated and determined adversely to the claim of the Appellant that he had been lawfully appointed to the office under an Act of the Legislature of the Territory of New Mexico, which Act was held to be invalid by the Supreme Court of New Mexico in the case of *Territory vs. Albright*, 78 Pac. 204 (12 N. M. 293), and that this Court had dismissed, for want of jurisdiction, an appeal from the latter judgment (200 U. S., 9.).

As the judgment appealed from is less than Five Thousand Dollars, it is manifest that a review is sought in this Court upon the theory that the case falls within the second section of the Act of March 3, 1885, (23 Stat. 443) by which the jurisdiction of this Court to review final judgments of the supreme courts of the territories is regulated. It is obvious, however, that the only question arising on this record is whether or not Appellant had received money belonging to Appellee which could be recovered in this action, and that the title to the office of Assessor of Bernalillo County could not properly become a subject of injury, except as it was a part of the plaintiff's case to show a final

adjudication against Appellant's right to the office. The answer attempts to assail collaterally the judgment in the *quo warranto* proceeding and to obtain another trial upon the issues which were finally adjudicated in that case.

The Supreme Court of New Mexico, affirming the judgment of the trial court, said:

"This is one of the fragments of a litigation which has been before this Court, in one form or another at almost every term, since 1904. The case at bar presents no features that have not been already fully considered and decided by this Court. The power of the County Commissioners to appoint Albright to the office of Assessor was decided adversely to him in *Territory vs. Albright*, 78 Pac. 204, 12 N. M., 293. The eligibility of Sandoval to hold office was decided favorably to Sandoval in the same case. The right of Sandoval, under these conditions, to recover the fees of the office, was settled in his favor, by the decision of this Court in *Sandoval vs. Albright*, No. 1190, decided January 13, 1908 (93 Pac. 717)."

Appellant in this action is prosecuting a writ of error and Appellee a cross-writ of error, from the judgment last mentioned in the opinion of the Supreme Court of New Mexico, and the cases are numbered 334-5 on the calendar of this term. The judgment against Appellee in that case is for more than Five Thousand Dollars, and the jurisdiction of this Court to review it is clear, but even if the trial court and the Supreme Court of the Territory were in error in holding the judgment in the *quo warranto* proceeding conclusive in the case at bar, this Court is without jurisdiction to correct the error; although it may do

so in the other case, if upon the hearing error is made to appear.

Territory ex. rel. Sandoval vs. Albright, 78
Pac. 204.

Same case, 79 Pac. 719.

Same case, 200 U. S. 9.

Sandoval vs. Albright, 93 Pac. 717.

Sandoval vs. Albright, 94 Pac. 947.

I respectfully submit that the motion to dismiss should be sustained.

NEILL B. FIELD,
Attorney for Appellee.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1908

No. 336. **118.**

GEORGE F. ALBRIGHT,
Appellant,

vs.

JESUS MARIA SANDOVAL,
Appellee.

MOTION TO CONSOLIDATE.

E. L. MEDLER,
Counsel for Appellant
Albuquerque, New Mexico.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1908

No. 336.

GEORGE F. ALBRIGHT,

Appellant,

vs.

JESUS MARIA SANDOVAL,

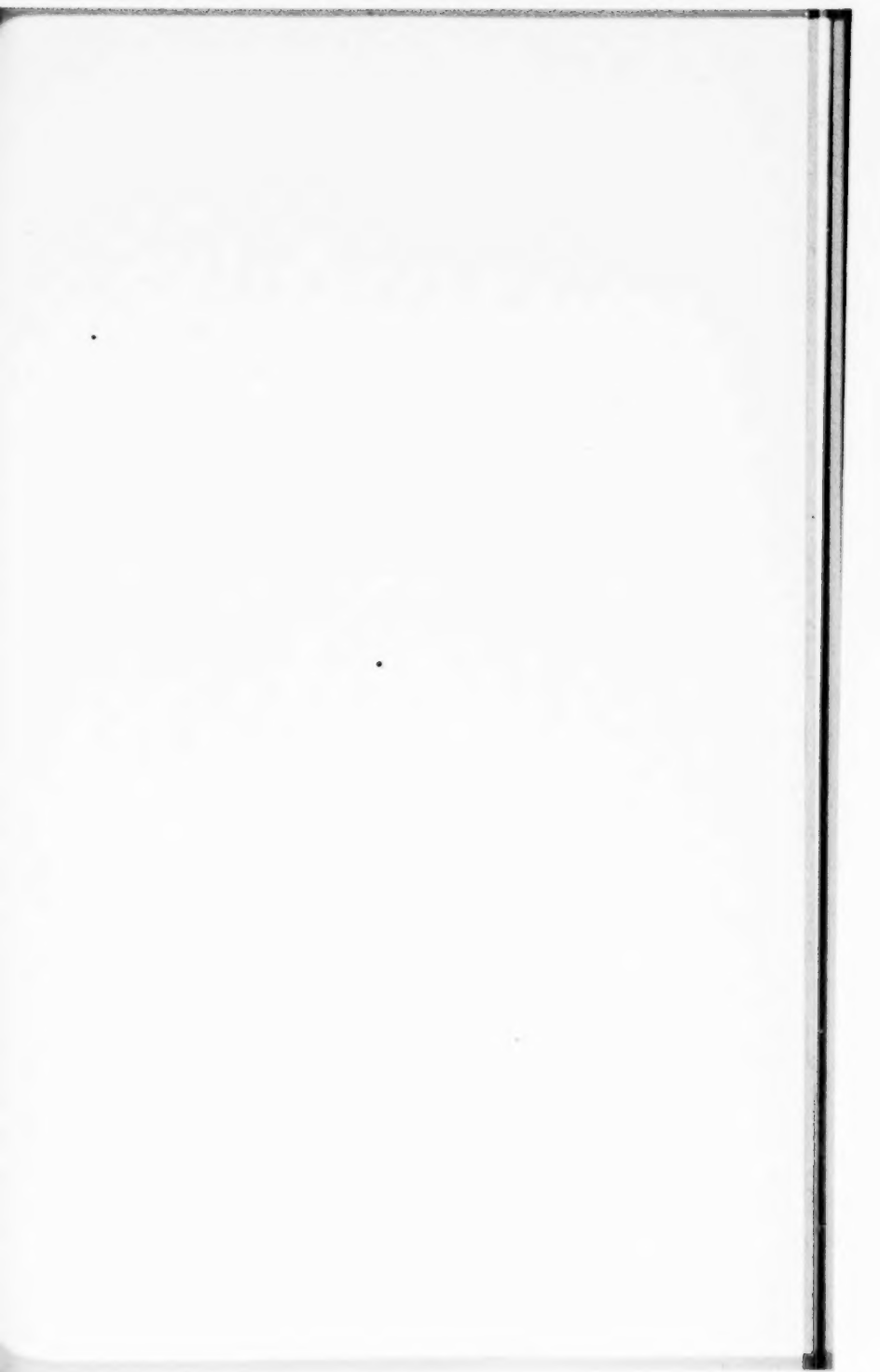
Appellee.

MOTION TO CONSOLIDATE.

Comes now the appellant, by E. L. Medler, his attorney, and moves the court that cases No. 334-335 and No. 336 be consolidated and tried at one and the same time, and appellant for cause of motion respectfully represents that said cases involve exactly the same issues; as said cases are both for fees claimed to be due for

part of one term of office as assessor of Bernalillo County, New Mexico, but said appellee apparently split his demand for said fees for the said term into two cases, but the same question and same legal principles are involved; as the parties are the same and both cases are in respect to the right of appellant to the office of assessor of Bernalillo County, New Mexico, under the legislation of the Territory of New Mexico and the fees for the term of office prescribed and created by said legislation, and both cases are one and the same cause and transaction in every particular, except as to time, as fully appears from the record of said cases and from the report of the Supreme Court of New Mexico in said cases as set out in cases Sandoval vs. Albright 94, Pacific Reporter 717 and Sandoval vs. Albright 93, Pacific Reporter 947. A decision upon the merits of either case would govern the court upon its judgment in the other, and we respectfully submit that the issues are the same and grow out of the same cause of action.

E. L. MEDLER,
Attorney for Appellant.



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Argument for Albright.

ALBRIGHT v. SANDOVAL.
SANDOVAL v. ALBRIGHT.ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

Nos. 116, 117. Argued January 28, 1910.—Decided February 21, 1910.

Where the final judgment of the Supreme Court of a Territory is not based on the power of the legislature to enact the statute involved but on the construction thereof, this court is not disposed to disturb that construction; and so held, following the decisions of the territorial court, that a statute of New Mexico carving a new county out of an existing one did not create a vacancy in an office of the original county because the incumbent did not reside in that portion of the county which remained.

Quare whether a judgment of ouster in *quo warranto* is conclusive between the same parties in a suit brought by the *de jure* relator against the *de facto* incumbent.

After judgment of ouster in *quo warranto* a *de jure* officer may recover the emoluments of the office, less the reasonable expenses incurred in earning the same, where, as in this case, the *de facto* officer entered the office in good faith and under color of title.

79 Pac. Rep. 719, affirmed.

THE facts are stated in the opinion.

Mr. E. L. Medler for Albright:

The entire controversy, including the status of the parties as to who was *de jure* assessor is before this court, for although the decision in the *quo warranto* case may bind the New Mexico courts it does not bind this court. *United States v. Denver & R. G. Ry. Co.*, 191 U. S. 86; *Dye v. Crary*, 208 U. S. 515; *Fitzpatrick v. Flanigan*, 106 U. S. 648; *Mendenhall v. Hall*, 134 U. S. 559; *Gallagher v. Jones*, 126 U. S. 193. The judgment in the *quo warranto* case is not *res judicata* in this case as the object of the judgment is different although the parties

are the same. *Gaines v. Hennen*, 24 How. 553; *Carey v. Roosevelt*, 81 Fed. Rep. 611.

The acts of the legislature of New Mexico of 1903 creating Sandoval County and the amendatory act were within the power of the legislature. Rev. Stat., § 1851. These acts are not in conflict with the Springer Act and the act of 1886 prohibiting the passage of special or local bills.

Where the legislature exercises a power to create new counties, it creates a vacancy in the old county and it is germane to the subject to fill that vacancy by the same special act. *State v. Piper*, 24 N. W. Rep. 205; *Reals v. Smith*, 56 Pac. Rep. 690.

The act creating Sandoval County and the amending act are not regulations of county affairs. *Holliday v. Sweet Grass County*, 48 Pac. Rep. 533; *Mode v. Beasley*, 42 N. E. Rep. 727.

The effect of the acts creating Sandoval County was to create a vacancy in the office of assessor of Bernalillo County and to provide for filling the same. *Lane v. Kolb*, 92 Alabama, 636; *State v. Board of Public Lands*, 7 Nebraska, 42; *Fox v. McDonald*, 21 L. R. A. 537; *De Guenther v. Douglass*, 26 Wisconsin, 428; *State v. Davis*, 44 Missouri, 129; *People v. Haskell*, 5 California, 357; *Attorney General v. Squires*, 14 California, 12; *Hoke v. Henderson*, 25 Am. Dec. 703, note; *Butler v. Pennsylvania*, 10 How. 402; *Stewart v. Police Jury*, 116 U. S. 133; *Taylor v. Marshall & Beckham*, 178 U. S. 548. As to power of removal and control of legislature over offices see *Crenshaw v. United States*, 134 U. S. 99; *Long v. Mayor*, 81 N. Y. 426; *People v. Hurlbut*, 24 Michigan, 44; *Denver v. Hobart*, 10 Newark, 30; *Territory v. Van Gaskin*, 6 Pac. Rep. 30.

As to the power of a territorial legislature unless restricted by the Constitution and laws of the United States, see *Vincennes University v. State*, 14 How. 267; *Rogers v. Burlington*, 3 Wall. 654; *Clinton v. Englebrecht*, 13 Wall. 446; and as to power of legislature to name officers temporarily, see *People v. Hurlbut*, 24 Michigan, 44; *Territory v. Van Gaskin*, 6 Pac.

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Rep. 32; *Territory of South Dakota v. Scott*, 20 N. W. Rep. 401; *Waterman v. Freeman*, 80 California, 233.

The appointment of Albright by commissioners as provided by the legislature was not void by reason of the act of 1901, providing for appointment by the governor to fill vacancies caused by death, resignation or otherwise. The rule of *ejusdem generis* does sustain appellee's contention. *United States v. Berans*, 3 Wheat. 391; *United States v. Chase*, 153 U. S. 255, 260; *Moore v. American Trar. Soc.*, 2 How. 141; Sedgwick on Construction of Statutes, 360; Cooley on Constitutional Law, 149.

The legislation was not void because it provided for a different manner of selection than that provided for other counties. *Guild v. Bank*, 57 N. W. Rep. 499; *Missouri v. Lewis*, 101 U. S. 22.

Residence is a necessary qualification to the office involved and the appellee is not qualified. Meecham on Public Offices, §§ 57, 67, 82, 159; *United States v. Johnson*, 173 U. S. 363; 23 Am. & Eng. Ency. of Law, 426; *Mauk v. Lock*, 70 Iowa, 266; *State v. Hixon*, 27 Arkansas, 398; § 772 and subs. 15, § 664, Comp. Laws New Mexico, 1897; *State v. McMillen*, 23 Nebraska, 385.

The territorial legislature had the power to declare such a vacancy irrespective of the question of Sandoval's residence. Rev. Stat., §§ 1851, 1857; Meecham, § 1; *Campbell v. Morris*, 3 Har. & M. (Md.) 535.

The acts creating Sandoval County went into effect from the date of their passage.

Albright's appointment was legal and no recovery could be had for the fees and emoluments collected by him as a *de facto* officer. 8 Am. & Eng. Ency. of Law, 815; *Hussy v. Smith*, 99 U. S. 20; *McDowell v. United States*, 159 U. S. 601; *Nofire v. United States*, 164 U. S. 661; *Ball v. United States*, 140 U. S. 125; *Norton v. Shelby County*, 118 U. S. 425; *Insurance Co. v. Seaman*, 80 Fed. Rep. 357.

A *de facto* officer is entitled in any event to retain the rea-

sonable expenses of earning the fees and emoluments of the office. 23 Am. & Eng. Ency. of Law, 403; *Mayfield v. Moore*, 53 Illinois, 428; *Re Havird*, 2 Idaho, 252; *Chowing v. Boger*, 9 Am. & Eng. Corp. Cas. 91; *Atchison v. Lucas*, 83 Kentucky, 451; *Arris v. Stukeley*, 2 Mod. 260; *Bier v. Gorrell*, 30 W. Va. 95.

There is no property in a public office. *Stuhr v. Curran*, 15 Vroom, 181; *Wayne County v. Benvit*, 4 Am. Rep. 382; *Taylor v. Beckham*, 178 U. S. 548; *Butler v. Pennsylvania*, 10 How. 402.

Mr. Neill B. Field for Sandoval:

An officer *de jure* may maintain an action for the recovery of the fees and emoluments of an office against a person who has been adjudged in *quo warranto* not entitled to the office. *Stuhr v. Curran*, 44 N. J. L. 181; *United States v. Addison*, 6 Wall. 291. And in such a suit the judgment of ouster is conclusive as to title of the office.

That judgment cannot be attacked collaterally. *New England Mortgage Security Co. v. Gay*, 145 U. S. 123; *Washington R. R. Co. v. District of Columbia*, 146 U. S. 227; *Kimball v. Kimball*, 174 U. S. 158.

Albright is liable to Sandoval for the entire amount received by him. Had it been a salaried office the measure would have been the entire salary and the rule should be the same as to fees, nor can Albright escape on the ground of having wronged Sandoval unintentionally. *Woodenware Co. v. United States*, 106 U. S. 432. As to measure of liability, see *Mayfield v. Moore*, 53 Illinois, 428; *Beard v. City of Decatur*, 7 Am. & Eng. Corp. Cases, 145; *Chowning v. Boger*, 9 Am. & Eng. Corp. Cases, 91; *Atchison v. Lucas*, 83 Kentucky, 451; *Arris v. Stukeley*, 2 Mod. 260; *Bier v. Gorrell*, 30 W. Va. 95; *Nichols v. MacLean*, 101 N. Y. 526; *Kreitz v. Behrensmeier*, 149 Illinois, 496; 3 Sutherland on Damages, 3d ed., § 693; *United States v. Addison*, 6 Wall. 291; *Michel v. New Orleans*, 32 La. Ann. 1094.

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MR. JUSTICE McKENNA delivered the opinion of the court.

These cases involve controversies over the right to the fees of the office of assessor of Bernalillo County, New Mexico. Plaintiff in error received the fees, defendant in error claims the right to them as the duly-elected officer.

There was prior litigation over the right of the office. Proceedings in the nature of *quo warranto* were instituted against plaintiff in error, by the Territory, upon the relation of defendant in error, to try the title of plaintiff in error to the office. Judgment went in favor of the latter in the trial court, which was reversed by the Supreme Court, and the case remanded for further proceedings. 78 Pac. Rep. 204.

Upon the subsequent proceedings in the trial court judgment was entered, declaring plaintiff in error not entitled to the office. The judgment also ordered him to deliver to the relator, defendant in error here, the records and the equipments of the office, "as the lawful custodian thereof." This part of the judgment was reversed by the Supreme Court; the other part, as to the title of plaintiff in error to the office, was affirmed. 79 Pac. Rep. 719. An appeal was taken to this court and dismissed because the matter in controversy was not "measurable by some sum or value in money." As to the fees of the office, it was said: "The term of office had expired before the rendition of judgment by the territorial Supreme Court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action. *New England Mortgage Security Co. v. Gay*, 145 U. S. 123; *Washington & Georgetown R. R. Co. v. District of Columbia*, 146 U. S. 227."

This action was brought for the past fees and emoluments of the office, amounting, it is alleged, to the sum of six thousand one hundred eighty-four dollars and sixteen cents (\$6,184.16).

The grounds of action are, as alleged, that Sandoval, de-

fendant in error, was duly elected to the office; that Albright, plaintiff in error, on the twenty-seventh of March, 1903, "usurped the same, and excluded the plaintiff therefrom, and received and appropriated to his own use the fees and emoluments" of the office until the nineteenth of November, 1904, when the plaintiff (defendant in error here), by a judgment in a "certain proceeding entitled The Territory of New Mexico on the relation of Jesus Maria Sandoval against the said George F. Albright, was restored to the possession of the said office." The judgment was made part of the complaint.

A demurrer was filed to the complaint. It was overruled. An answer was then filed which practically admitted the allegations of the complaint, except the legal right of the plaintiff to the fees of the office. It admitted that in the *quo warranto* proceeding it was adjudged that Albright was not entitled to the office and had usurped the same, and that Sandoval was entitled to it. The answer, however, set up a right to the office in Albright; that on the twenty-third of March, 1903, he was appointed assessor of the county by the board of county commissioners of the county, acting under and by virtue of § 3 of an act of the legislative assembly of the Territory, entitled an act to create the county of Sandoval, approved March 10, 1903, as amended March 12, 1903. That the office of assessor of the county of Bernalillo became vacant by reason of such legislation, Sandoval County having previously been a part of Bernalillo. The validity of such legislation was alleged and that the power of appointment was vested thereby in the board of commissioners created by the amendatory act of March 12. It is alleged also that "the office was subject to the control of the legislature and that a vacancy thereafter was created by said acts." That Sandoval, at the time Sandoval County was created, was and had been a long time before a resident of Bernalillo, and ceased, therefore, upon the passage of the acts creating Sandoval County, to be a resident of Bernalillo, and became disqualified from exercising the duties of the office of assessor thereof, to which

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he had been elected, and that at the time of the appointment of Albright the office was and had been vacant from the time of the creation of Sandoval County.

The answer admitted the receipt of \$6,648 on account of fees and emoluments, and alleged that Albright paid out the sum of \$2,142.25 for clerical and other expenses necessarily incurred in administering the office, which amount, he alleged, he was "entitled to receive as a set off against any demand" against him. And he alleged that the said sum was paid in good faith. There was a demurrer to the answer filed and a replication. The latter accepted the statement of the amount received by Albright, alleged want of information as to the amount expended as expenses of the office, and denied that Albright was an incumbent of the office in good faith.

The demurrer was sustained to all parts of the answer except those alleging receipt of fees and the payment of expenses. As to them, evidence was submitted to a jury, which, under the direction of the court, returned a verdict for the plaintiff, Sandoval, in the sum of \$5,360.53, which was the amount sued for less the expenses which had been incurred by Albright. Both parties moved for a new trial, the plaintiff on account of the allowance of the expenses, the defendant on account of the recovery against him of the fees and emoluments received by him. Judgment was entered for the amount of the verdict in favor of the plaintiff, and affirmed by the Supreme Court. 93 Pac. Rep. 717. Both parties sued out writs of error. That of Albright (No. 116) is directed to the judgment against him; that of Sandoval (No. 117) to redress the error, which he contends, was made against him in allowing as a set off against his demand, the expenses that Albright had incurred in administering the office.

It is clear that the only questions of fact presented by the pleadings were as to the amount received and the amount expended by Albright. This was the view taken of them by the Supreme Court. That court said: "The right of office and that the appellee [defendant in error here] was the *de jure*

officer were fully determined in the former suits, and cannot be considered in this, therefore the court below properly sustained the demurrer to all such parts of the answer as sought to raise this issue." The suits referred to by the court were *Albright v. Territory*, 78 Pac. Rep. 204; *Territory v. Albright*, 79 Pac. Rep. 719; *Albright v. Sandoval*, 200 U. S. 9.

The court, therefore, addressed itself to the two propositions which it conceived were left in the case, the right of Sandoval to recover the fees received by Albright and the right of the latter to set off against them his disbursements for expenses. The court, passing on the first proposition, found, it said, no statute of the Territory "governing this subject," but decided that "the common law, in the absence of a statute, authorizes a recovery by the officer *de jure* in such cases." On the second proposition it found that there could be no question of Albright's good faith, and that it considered the cases made good faith "the controlling consideration for the allowances of expenses to an ousted *de facto* officer," and affirmed the judgment of the trial court.

Plaintiff in error, however, goes back of the decision of the Supreme Court, and contends that he is not only an officer *de facto* but an officer *de jure*. In other words, he asserts the correctness of the position taken in his answer that by the legislation creating Sandoval County defendant in error ceased to be the assessor of Bernalillo, to which he was duly elected, that therefore a vacancy existed to which plaintiff in error was duly appointed.

The basis of this contention is the power of the legislature to create Sandoval County, and that by the exercise of the power defendant in error was made a resident of Sandoval County and became disqualified to be assessor of Bernalillo. From this it followed, it is argued, a vacancy occurred to which plaintiff in error was appointed under the act amending the act creating Sandoval County. It certainly follows that if the residence of defendant in error in Sandoval County did not create a vacancy there was none to fill, unless, as it is

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contended by defendant in error, that the legislature has the power to create a vacancy and actually exercised the power.

In *Territory v. Albright*, 78 Pac. Rep. 204, the judgment of the trial court, which dismissed the *quo warranto* proceedings, was reversed, as we have seen. The Supreme Court said that the trial court, in considering the section of the acts relied on by plaintiff in error, "arrived at the conclusion that it was the intention of the legislature to declare that office [the office of assessor of Bernalillo County] vacant, and therefore, although those sections did not contain a declaration to that effect, the court was of the opinion that these sections should be given the effect of such a declaration." But the Supreme Court added, "we cannot concur with the trial court in this conclusion," and proceeded to analyze the legislation, and decided that it did not have the meaning plaintiff in error attributes to it. In other words, did not create a vacancy in the office of assessor of Bernalillo County. And considering the laws of the Territory as to the qualification of county officers, decided that residence was not one of them. The court further decided that when plaintiff in error was appointed the act, under which it is contended that it was done, had not taken effect, and that, therefore, his appointment was unauthorized.

The court, considering the legislation in view of the powers of the legislature as limited by the act of Congress of July 30, 1886 (24 Stat. 470, c. 818), concluded that the legislature had not the power to remove and appoint county officers as contended, but the decision of the case was put on the other grounds which we have stated. In other words, put upon the construction of the statutes. And that construction we are not disposed to disturb. *Fox v. Haastick*, 156 U. S. 674; *English v. Arizona*, 214 U. S. 359; *Dye v. Crary*, 208 U. S. 515.

Under these views it is not necessary to decide whether the judgment in the *quo warranto* proceedings is conclusive of the issues in this case, as contended by defendant in error.

The decision upon the respective rights of the parties arising from the statute of the Territory may be rested on the grounds which we have expressed, and we come to the proposition whether Sandoval can recover the fees and emoluments received by Albright, and whether, if he can, may the latter set off his expenses. The first proposition is not controverted by Albright, although he suggests that there are some well-considered cases the other way, and he cites *Stuhr v. Curran*, 15 Vroom (44 N. J. L.), 181. He also cites *Taylor v. Beckham*, 178 U. S. 548; *Butler v. Commonwealth of Pennsylvania*, 10 How. 402, for the view that there is no such thing as property in a public office. However, his ultimate concession is that the weight of authority is to the effect that a *de jure* officer may recover from the *de facto* officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the *de facto* officer entered into the office in good faith and under color of title. And this was the view of the Supreme Court of the Territory. To sustain the first proposition the court reviewed *Stuhr v. Curran*, *supra*, and cites against it *United States v. Addison*, 6 Wall. 291; *Dolan v. Mayor of New York*, 68 N. Y. 274; *Hunter v. Chandler*, 45 Missouri, 452; *Glascock v. Lyons*, 20 Indiana, 1; *Douglass v. State*, 31 Indiana, 429; *People v. Miller*, 24 Michigan, 458; *Dorsey v. Smyth*, 28 California, 21; *Nichols v. McLean*, 101 N. Y. 538; *Kreitz v. Behrensmeyer*, 149 Illinois, 503; *Vaur v. Jefferen*, 2 Dyer, 114; *Arris v. Stukeley*, 2 Mod. 260; *Lee v. Drake*, Salk. 467, 468; *Webb's Case*, 8 Rep. 45; 1 Selw. N. P. 81; 1 Chil. Pl. 112. It is not necessary to make a review of these cases. It is enough to say that they sustain the proposition for which they are cited.

The second question is more debatable, to wit, whether Sandoval was entitled to the gross receipts of the office, as contended by him, or to the net receipts as contended by Albright and as decided by the courts below.

Counsel for Sandoval sees and admits the difficulties which beset the question, and is not insensible to the justice under

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the circumstances of this case of the deductions allowed by the courts below.

There is argument based on the illegality of Albright's occupation of the office, and strength in the contention that a trespasser may not set off the expense he incurred in executing the trespass. It has been held, in a well-considered case, there can be no deduction for the personal services of the intruder. *People v. Miller*, 24 Michigan, 458. It was said in that case, however, that "There may be reason for deducting from any official earnings the actual cost of obtaining them which would have been entailed on any person who might have held the office." This may be said of the expenses in controversy in the case at bar. *Mayfield v. Moore*, 53 Illinois, 428, is the leading case which sustains the right to deduct such expenses. This case is followed by others in the same court and the same view has been announced by other courts. We think they express the correct rule. It makes the measure of recovery the extent of the injury, and the injury, it is clear, is not the gross earnings of an office, but such earnings less, to use the language of Mr. Chief Justice Campbell in *People v. Miller, supra*, "the actual cost of obtaining them which would have been entailed on any person who might have held the office."

Judgment affirmed.

ALBRIGHT *v.* SANDOVAL (NO. 2).

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
NEW MEXICO.

No. 118. Argued January 28, 1910.—Decided February 21, 1910.

Where the decision of the Supreme Court of a Territory is based upon the construction of the territorial statute involved, and not upon the power of the legislature to pass it, an appeal does not lie to this court, if the amount in controversy is less than \$5,000.

A decision of the territorial court as to who had the right to an office which depends on whether the office was or was not vacant, and whether or not an appointment was made before the statute involved took effect, depends upon the construction of, and not the power of the legislature to pass, such statute; such a case does not involve the validity of an authority exercised under the United States and an appeal does not lie to this court if the amount in controversy is less than \$5,000.

Appeal from 94 Pac. Rep. 947, dismissed.

THE facts are stated in the opinion.

Mr. E. L. Medler for appellant.

Mr. Neill B. Field for appellee, submitted.

MR. JUSTICE McKENNA delivered the opinion of the court.

The appeal involves the same questions as those that have just been decided in No. 116, *Albright v. Sandoval*, *ante*, p. 331. In the latter case the right of Sandoval to recover the fees and emoluments of the office of assessor of Bernalillo County from Albright is decided.

The case at bar is another action for additional fees received by Albright. The judgment rendered was for the sum of \$1,688.84, which, with interest, amounted to the sum of

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Opinion of the Court.

\$1,813.25. The judgment was affirmed by the Supreme Court, 94 Pac. Rep. 947. This appeal was then taken. A motion is made to dismiss it on the ground that the amount in dispute does not exceed \$5,000. To this it is replied that the case involves the validity of an authority exercised under the United States in the passage of the laws by which, it is contended, Albright derived a right to the office.

The appellant supports this contention by saying that his answer in the trial court raised the "legal propositions of the power and authority of the Territorial legislature to pass the acts creating Sandoval County and to vest the power of appointment in the county commissioners of Bernalillo County," and also contained a full record of the *quo warranto* proceedings in which the same questions were raised. But by reference to the opinion in No. 116 it will be seen that the Supreme Court rested its decision upon the construction of the statutes, not upon the want of power in the legislature to pass them. As to the acts themselves, the Supreme Court said: "It does not seem necessary or profitable in this case to consider the question of the power of the legislature, for the reason that however adequate the power of the legislature might be, if the legislature did not see fit and had not intended to exercise the power to declare the office of assessor of Bernalillo County vacant by the legislation enacted, the legal right of the incumbent elected by the people of the county is not affected by the legislation, and no vacancy existed, to be filled either by election or by appointment."

As to the vacancy alleged to have occurred by the non-residence of Sandoval in Bernalillo County, the court said that it was unable to find any provision of the statutes "requiring residence in the county as a qualification to hold the office of assessor." And further said that it was hence "led to the logical conclusion that even if it were admitted that Sandoval had been for years and was still residing in what would become Sandoval County when the act took effect, that fact would neither disqualify Sandoval from holding his office nor

have the effect of rendering the office vacant." And again: "The legislature acted upon a mistaken view of the law and the result of which was to provide for the election of an officer to an office not vacant, but which, on the contrary, was in the possession of a legally elected and qualified incumbent." It was also decided that Albright's appointment was made before the law took effect and necessarily was illegal.

Upon the second appeal of the case the court did not enlarge on the ground of its decision. 79 Pac. Rep. 719. It follows that as Sandoval's right to the office and Albright's want of right were based upon the construction of the statutes of the Territory, not upon power of the legislature to pass them, the motion to dismiss must be granted, and it is

So ordered.
